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Supreme Court of the United States

OCTOBER TERM, 1963

No. 116

DONALD S. HOSTETTER, ET AL., ETC.,
APPELLANTS,

vs.

IDLEWILD BON VOYAGE LIQUOR CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 7, 1963

PROBABLE JURISDICTION NOTED OCTOBER 14, 1963

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[fol. 1] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action

No. 60 Civ. 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Plaintiff,

—against—

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York, Defendants.

COMPLAINT—Filed July 22, 1960

Plaintiff, for its complaint herein, alleges:

1. This action arises under Article I, Section 8, Clause 3 (interstate and foreign commerce clause) and Article I, Section 10, Clause 2 (import, export clause) of the Constitution of the United States, and under Section 311 of the Tariff Act of 1930 [19 U.S.C. §1311], and Sections 5521 and 5522 of Title 26 U.S.C., the Internal Revenue Code, as hereinafter more fully appears. This action is for an injunction pursuant to the provisions of Sections 2281 and 2284 of Title 28 U.S.C. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

2. At all times hereinafter mentioned plaintiff was and still is a corporation duly organized and existing under the laws of the State of New York, having its principal place of business at Arrivals Building, New York International Airport, Jamaica, Queens County, New York.

3. The defendant Thomas E. Rohan is the Chairman [fol. 2] of the State Liquor Authority, an administrative agency of the State of New York created under Article 2

of the Alcoholic Beverage Control Law of the State of New York, and resides at 158-18 Riverside Drive West, in the Borough of Manhattan, City, County and State of New York, within the Southern District of New York, and has an office for the transaction of business of the Authority at 270 Broadway, in the Borough of Manhattan, City, County and State of New York, within said District. The defendants Martin C. Epstein, William H. Morgan, Grant F. Daniels and Samuel M. Birnbaum are members and commissioners of the said State Liquor Authority.

4. Plaintiff's operations hereinafter described are conducted in the Arrivals Building at New York International Airport at Idlewild in the Borough of Queens, City and State of New York, under an Agreement of Lease dated October 31, 1956, made to it, as lessee, by The Port of New York Authority, as lessor. The lease provides that the premises may be used by the plaintiff, and they are so used, solely for an office in connection with the sale for export to foreign countries by the plaintiff of in-bound wines and liquors.

Plaintiff is using, and is required to use, such premises solely for an office in connection with the receipt of paid orders for export by the plaintiff of United States Customs bonded wines and liquors, which are free of United States and New York State taxes, to foreign countries only and not for use in the State of New York, or in any other State, Territory or Possession of the United States.

The leased premises have been approved by and are [fol. 3] in the custody and under the supervision and control of the United States Bureau of Customs both as regards the initial construction and security of the space and as regards its constant and continuing supervision and the accountability of plaintiff for all wines and liquors exported under Customs Regulations adopted pursuant to the authority of the Tariff Act of 1930 as amended. Such wines and liquors are at all times in the custody of the Bureau and are kept under lock and key in these premises and are entered in and withdrawn from these premises on Bureau of Customs documents and forms and under its supervision and control.

The bonded wines and liquors exported by plaintiff are purchased for such purpose by plaintiff solely from various suppliers while in bond and withdrawn for export only by plaintiff exclusively from Class 6 United States Government bonded manufacturing and United States Customs bonded warehouses, where they are located, for rewarehousing at the United States Customs controlled space of the plaintiff in such leased premises under such Customs Regulations. Plaintiff is required to keep, and does keep, full records and receipts on United States Customs approved forms governed by such Regulations for the disposition of each and every bottle withdrawn.

Each bottle is required by Section 5301 of the Internal Revenue Code and by the provisions of Regulations 26, Code of Federal Regulations, Part 201, Section 201.467, adopted thereunder and to which reference is hereby made, to be labeled with an export label "Bottled for export from the U.S.A.", the use of which label for domestic purposes [fol. 4] or purposes other than export is rendered illegal by applicable federal laws and regulations.

The bonded, tax-free wines and liquors manufactured and stored exclusively in such bonded warehouses, purchased from the suppliers for export only and sold by the plaintiff from its leased premises for export solely, remain at all times in the constant and continuous custody, control and supervision of the United States Treasury Department, Bureau of Customs, under Regulations adopted pursuant to Section 311 of the United States Tariff Act of 1930 [19 U.S.C. §1311], as amended, which are designed to, and do, insure against the diversion of the wines and liquors for use in the State of New York or elsewhere in the United States and which continuously insure the export thereof to foreign countries. The elaborate and exhaustive precautionary measures contained in the Regulations which provide such continuous custody and supervision of the wines and liquors and of plaintiff's operations by the United States Customs Bureau and its officials (a) while in such bonded warehouses, (b) during transshipment therefrom to the premises leased by plaintiff, (c) while in said premises, and (d) during transportation to and load-

ing on the carrier and down to the moment of departure, are contained in the Code of Federal Regulations, Title 19, ch. 1, Parts 18 and 19, and in Regulations adopted pursuant to the applicable provisions of the Internal Revenue Code above referred to, reference to which is hereby made.

None of the wines and liquors sold by the plaintiff have been or can be diverted to use in the State of New York or [fol. 5] elsewhere in the country. Class 6 bonded warehouses and United States Customs bonded warehouses are designed exclusively for the storage in bond of wines and liquors, tax-free, solely for exportation and are the only classes of warehouses in which these articles, once they have been placed therein, are irrevocably destined for export and from which they cannot ever be legally withdrawn for domestic use or sale or enter domestic commerce even upon tender of taxes and duties, and such Tariff Act and Regulations have been so construed by the Treasury Department, Bureau of Customs, the Federal agency charged with their administration and enforcement. Such products constitute exports from the moment they are placed in such warehouses.

Orders for the purchase of such wines and liquors are received by plaintiff, and paid for at plaintiff's office in the leased premises, from passengers exclusively for export to such passengers departing solely by non-stop planes from the Airport to foreign countries only. The wines and liquors so exported are delivered by plaintiff pursuant to said Customs Regulations under Customs supervision to the airlines only, and not to the purchasers or passengers, on approved documents for foreign export, with delivery to the passengers to be made only at the foreign destination of the passengers subject, as aforesaid, to the continuing supervision and control, under said Regulations, of the Bureau of Customs, which certifies that the goods were laden for export.

The operations of the plaintiff are intended and employed [fol. 6] for the benefit primarily of Economy Fare passengers of moderate means who constitute the majority of the passengers departing from the New York International Airport at Idlewild. Plaintiff's average sales consist of one

bottle per passenger since most European countries by law permit only one such bottle to be so imported duty-free. Thus a passenger going abroad who normally would pay approximately $7 for a bottle of liquor in most sections of Europe is enabled by plaintiff's operations to have exported and delivered to him abroad a single bottle purchased from plaintiff at a cost of approximately $3.

Such privilege afforded by plaintiff's operations to international travelers (a) encourages foreign travel by nationals of the United States and of all foreign countries since it is a privilege reciprocal to that granted in foreign countries to passengers bound for the United States who are permitted to purchase a limited quantity of liquor abroad and to import such liquor into the United States free of United States duties and United States and New York taxes, and (b) opens new markets for the export of American liquors and thus assists in stimulating foreign trade therein in accordance with the statutory Congressional economic policy hereinafter set forth.

5. The entire plan of plaintiff's operations and procedures as set forth above in paragraph 4 of this complaint has been approved by the United States Bureau of Customs.

6. The United States Treasury Department, Bureau of [fol. 7] Customs, has ruled that these transactions constitute exports to foreign countries of such bonded, tax-free wines and liquors within the meaning of Section 311 of the United States Tariff Act of 1930 as amended [19 U.S.C. §1311]. A copy of that ruling and section is annexed hereto as Exhibit A. The United States Treasury Department, Bureau of Customs, has accordingly declared, pursuant to the authority vested in it by law and regulations, that such transactions constitute exports and are exempted by law from all Federal excise taxes and duties on the wines and liquors exported.

7. Defendants, acting upon an opinion of the Attorney General of the State of New York, dated June 30, 1960 (a copy of which is annexed hereto as Exhibit B), have advised plaintiff that they have determined that plaintiff's operations set forth above in paragraph 4 of this complaint

are illegal as in violation of Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, because the transactions between plaintiff and its suppliers and plaintiff and the purchasers of said bonded, tax-free wines and liquors constitute sales within the State of New York which cannot be made without obtaining appropriate license. The defendants concede, and it is a fact, that the Alcoholic Beverage Control Law makes no provision for licensing operations such as those carried on by the plaintiff. A copy of a letter embodying such determination, dated July 11, 1960, is annexed hereto as Exhibit C. It is further a fact, and the New York State Department of Taxation has ruled, that under the Tax Law of the State [fol. 8] of New York, Section 424(f), the State of New York is without power to tax plaintiff's transactions in these tax-free wines and liquors. A copy of the applicable provisions of said section and of such ruling, dated August 2, 1954, is annexed hereto as Exhibit D.

8. Defendants have further determined, and have advised plaintiff of such determination, that Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York (copies of which are annexed as Exhibit E), prohibit and make unlawful and a crime plaintiff's operations aforesaid, including both plaintiff's purchases for export from its suppliers and plaintiff's sales for export. Defendants have further threatened to enforce, and will, unless restrained by this Court, enforce or endeavor to enforce such determination by restraining or endeavoring to restrain and prohibit plaintiff's operations and by subjecting plaintiff to civil and criminal proceedings to enforce and carry out their determination, all to the great and irreparable damage of the plaintiff.

[fol. 9] 9. As a result of defendants' acts as aforesaid, the New York Importers and Distillers Association, Inc. has already circularized its many members, consisting of the largest distillers and exporters of bonded liquor in this country, including those from which plaintiff purchases

bonded, tax-free wines and liquors for export to foreign countries, advising such members not to fill plaintiff's orders or to sell to the plaintiff bonded, tax-free wines and liquors for such export because of the defendants' determination that plaintiff's operations are in violation of the above-mentioned sections of the Alcoholic Beverage Control Law of the State of New York and that such sales to the plaintiff are not within the scope of wholesalers' licenses under Section 62 of such Law.

10. As a result of defendants' acts as aforesaid, plaintiff will, unless defendants are enjoined by this Court, suffer the loss and forfeiture of its valuable lease which is conditioned on the continuance of plaintiff's operations, or the loss of the right of possession thereunder, while remaining liable for the rental under such lease, and will further sustain great and irreparable injury and damage in that it will be compelled to cease its operations, and its business, valued well in excess of $1,000,000, will be destroyed and the plaintiff and its officers will be subjected to fines or criminal penalties pursuant to Section 130 of the Alcoholic Beverage Control Law.

11. Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Con-
[fol. 10] trol Law of the State of New York, in so far as they require plaintiff to obtain a license to carry on the operations set forth in paragraph 4 of this complaint or prohibit or render such operations unlawful or criminal are unconstitutional and void as repugnant to the provisions of Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2 of the Constitution of the United States for the following reasons, among others:

(a) The Tariff Act of 1930, as amended and the Regulations adopted thereunder, taken in conjunction with the provisions of the applicable Internal Revenue Code, including Title 26 U.S.C., Sections 5521 and 5522, together constitute, and have been construed by the Supreme Court and the courts of the State of New York to constitute, a comprehensive, exclusive and preemptive scheme duly adopted by Congress for the regulation, encouragement and promotion of foreign commerce in, and exports of, bonded wines and

liquors, which are thereby and for that purpose exempted from all taxes and duties, including State taxes, under the powers vested exclusively in Congress under the Commerce Clause of the Federal Constitution, Article I, Section 8, Clause 3, and under Article I, Section 10, Clause 2 thereof, which commands that no state shall without consent of Congress lay any imposts or duties on imports or exports, and under Article VI, Clause 2 thereof making the "Constitution and laws of the United States which shall be made in pursuance thereof * * * the supreme law of the land." [fol. 11] Plaintiff's operations fall directly within the scope and purpose of this Congressional economic statutory policy for the development, by means of such tax exemption, of foreign markets for American liquors by enabling them to compete abroad with similar foreign products.

(b) These Regulations and the continuous custody, supervision and control of plaintiff's operations by the United States Treasury Department, Bureau of Customs, insure that the bonded, tax-free wines and liquors are irrevocably destined for export to foreign countries only and cannot ever be, and are not, diverted to use in the State of New York or elsewhere in the United States, and cannot and do not enter domestic commerce.

(c) Under plaintiff's operations governed by these Regulations of the Treasury Department, Bureau of Customs, as aforesaid, there is an assured continuous and uninterrupted movement of such bonded, tax-free wines and liquors in foreign commerce for export to foreign countries. Upon delivery thereof to the airlines in non-stop transoceanic aircraft such liquors and wines cannot be relanded in the United States or otherwise enter domestic commerce. Such bonded, tax-free wines and liquors are in the actual possession and custody of the United States Government, never have become and never can become a part of the mass of property within the State of New York, and are not legally [fol. 12] within the State. The State of New York never has acquired and never can acquire jurisdiction thereof for the purpose of prohibiting their purchase and sale for export and their export and transportation in foreign com-

merce or of requiring license therefor, or rendering the same unlawful and subject to civil and criminal sanctions. Since the State of New York has no power under the Federal Constitution to tax exports thereof to foreign countries, *a fortiori* it has no power to prohibit them or to render them illegal and criminal, nor any power to prohibit and obstruct foreign commerce therein.

(d) Neither are any of the above powers conferred on the State of New York by the Twenty-First Amendment to the Federal Constitution which provides that "the transportation or importation into any State, Territory or Possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited" for the reasons, among others, that there has been and can be under plaintiff's said operations no transportation or importation of plaintiff's bonded, tax-free wines and liquors for delivery or use in the State of New York, nor would that State possess, by virtue of such Amendment, the power to prohibit altogether such importation even if such an importation had taken place. Further, [fol. 13] Congress by the adoption of the Tariff Act of 1930 and the applicable provisions of the Internal Revenue Code and applicable regulations thereunder, has fully preempted the whole field of such liquor exports, and purchases and sales for export, and their custody, regulation, control and supervision under the Commerce Clause of the Federal Constitution, and any attempt by the State of New York to license, regulate or prohibit plaintiff's transactions in such wines and liquors is in direct conflict with such Federal regulation.

12. The acts of the defendants create an existing dispute between the parties as to plaintiff's present legal rights amounting to a justiciable controversy which plaintiff is entitled to have determined in this action on the merits by a three-judge court under 28 U.S.C., Section 2281, which plaintiff requests be impaneled for the determination of this controversy.

13. Plaintiff is entitled to maintain this action and to obtain the relief therein requested from this Court, and

cannot be required to have recourse for such relief to the Courts of the State of New York, even assuming, contrary to the facts, that the latter have jurisdiction to grant such relief and that the State statutes afford plaintiff an adequate remedy in such Courts, for the following reasons:

The Federal rights for which plaintiff asks the protection of this Court in this action are based solely upon the provisions of the Federal Constitution and on the comprehen- [fol. 14] sive, exclusive and preemptive Federal statutory scheme outlined above (with which the State statute and the defendants' acts here are in direct conflict) for the encouragement, protection and regulation of foreign trade in, and export of, tax-free bonded wines and liquors and upon specific paramount considerations of Federal (not State) policy which can only be adequately, properly and fully determined and protected by a Federal Court.

Denial of plaintiff's right of access to this Court would deprive plaintiff of its right to a prompt and expeditious determination of the Federal issues involved. Such denial would subject the plaintiff to the added unnecessary delay and expense of a costly, protracted and futile litigation through all the courts of the State, only to be finally resolved in the end by a decision of the United States Supreme Court.

14. Plaintiff has in fact and in law neither any administrative remedy under the Alcoholic Beverage Control Law of the State of New York nor any adequate remedy in its Courts because Section 121 of that Act (a copy of which is annexed as Exhibit F) not only excludes the defendants' acts above set forth from review by its Courts, but in all cases where any such review is allowed confines the granting of any stay pending such review to a period not exceeding thirty days.

15. Plaintiff has no plain, adequate or complete remedy at law.

Wherefore, complainant prays:

A. That this Court hold and adjudge that as applied to [fol. 15] the plaintiff, Section 3, subdivision 28, and Section

62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other provisions of said Law which defendants might claim would affect plaintiff's operations, are unconstitutional and void as being contrary to Article I, Section 8, Clause 3 of the Constitution of the United States, which provides that Congress shall have the power to regulate commerce with foreign nations.

B. That this Court hold and adjudge that as applied to the plaintiff, Section 3, subdivision 28, and Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other provisions of said law which defendants might claim would affect plaintiff's operations, are unconstitutional and void as being contrary to Article I, Section 10, Clause 2 of the Court of the United States which prohibits a state, without the consent of Congress, from laying any imposts or duties on imports or exports, and as being in violation of Section 311 of the Tariff Act of 1930 [19 U.S.C. §1311] and of the provisions of the applicable Internal Revenue Code.

C. That this Court issue an injunction, both preliminary and permanent, enjoining the defendants, and each of them, from enforcing or attempting to enforce against the plaintiff and from putting or attempting to put into execution as against it Section 3, subdivision 28, and Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other provisions of said Law which the defendants might claim [fol. 16] would affect plaintiff's operations, either by invoking or attempting to invoke its civil or criminal sanctions or otherwise.

D. That complainant have such other and further relief in the premises as may be just and proper.

Kelly and Schwartz, By John F. Kelly, Member of Firm, Office and P. O. Address: 1780 Broadway, New York 19, New York.

[fol. 17] *Duly sworn to by Arthur Giliotti, jurat omitted in printing.*

[fol. 18]

EXHIBIT A TO COMPLAINT

Copy for; Mr. John F. Kelly
Kelly and Schwartz
1780 Broadway
New York 19, New York

TREASURY DEPARTMENT

BUREAU OF CUSTOMS

WASHINGTON 25

(Emblem)

OFFICE OF THE COMMISSIONER

ADDRESS REPLY TO
COMMISSIONER OF CUSTOMS

IN REPLY REFER TO
DB 235

Your file:
FBL:vw:19.15

APR 15 1958

Dear Mr. Dill:

We refer to your letter of March 10, 1958, concerning the proposal of the Idlewild Bon Voyage Liquor Corporation for the withdrawal of liquor from class 6 bonded manufacturing warehouses for rewarehousing in the company's locker at Idlewild Airport and subsequent sale to foreign-bound airline passengers, free of duty and tax. You state that under the proposed procedure final delivery of the liquor will be made by flight personnel of the plane after departure from the United States.

In a letter dated December 27, 1957, to John F. Kelly, attorney for the Idlewild Bon Voyage Liquor Corporation, the proposal of the applicant was rejected under the theory that delivery of the liquor to the passengers in flight did not meet the requirements of section 311, Tariff Act of 1930, as amended. A copy of this letter was furnished to your office.

The applicant has now modified its proposal to the extent that the liquor will be delivered to the airline on approved

documents for export with delivery to the passenger to be made only at the foreign destination of the passenger.

We believe that delivery of the liquor to the passenger after he has reached his port of debarkation would be an exportation of the merchandise within the meaning of section 311 of the tariff act. Therefore, with the distinct understanding that the liquor will be so delivered, the procedure proposed by the applicant is approved.

Very truly yours,

(Signed) D. B. STAUBINGER
Acting Commissioner of Customs

Hon. Robert W. Dill
Collector of Customs
New York 4, New York

[fol. 19] § 1311. Bonded manufacturing warehouses

All articles manufactured in whole or in part of imported materials, or of materials subject to internal-revenue tax, and intended for exportation without being charged with duty, and without having an internal-revenue stamp affixed thereto, shall, under such regulations as the Secretary of the Treasury may prescribe, in order to be so manufactured and exported, be made and manufactured in bonded warehouses similar to those known and designated in Treasury Regulations as bonded warehouses, class six: *Provided*, That the manufacturer of such articles shall first give satisfactory bonds for the faithful observance of all the provisions of law and of such regulations as shall be prescribed by the Secretary of the Treasury: *Provided further*, That the manufacture of distilled spirits from grain, starch, molasses, or sugar, including all dilutions or mixtures of them or either of them, shall not be permitted in such manufacturing warehouses.

Whenever goods manufactured in any bonded warehouse established under the provisions of the preceding paragraph shall be exported directly therefrom or shall be duly laden

for transportation and immediate exportation under the supervision of the proper officer who shall be duly designated for that purpose, such goods shall be exempt from duty and from the requirements relating to revenue stamps.

No flour, manufactured in a bonded manufacturing warehouse from wheat imported after ninety days after June 17, 1930, shall be withdrawn from such warehouse for exportation without payment of a duty on such imported wheat equal to any reduction in duty which by treaty will apply in respect of such flour in the country to which it is to be exported.

Any materials used in the manufacture of such goods, and any packages, coverings, vessels, brands, and labels used in putting up the same may, under the regulations of the Secretary of the Treasury, be conveyed without the payment of revenue tax or duty into any bonded manufacturing warehouse, and imported goods may, under the aforesaid regulations, be transferred without the exaction of duty from any bonded warehouse into any bonded manufacturing warehouse; but this privilege shall not be held to apply to implements, machinery, or apparatus to be used in the construction or repair of any bonded manufacturing warehouse or for the prosecution of the business carried on therein.

Articles or materials received into such bonded manufacturing warehouse or articles manufactured therefrom may be withdrawn or removed therefrom for direct shipment and exportation or for transportation and immediate exportation in bond to foreign countries or to the Philippine Islands under the supervision of the officer duly designated therefor by the collector of the port, who shall certify to such shipment and exportation, or ladening for transportation, as the case may be, describing the articles by their mark or otherwise, the quantity, the date of exportation, and the name of the vessel: *Provided*, That the by-products incident to the processes of manufacture, including waste derived from cleaning rice in bonded warehouses under the Act of March 24, 1874, in said bonded warehouses may be withdrawn for domestic consumption on the payment of duty equal to the duty which would be assessed

and collected by law if such waste or by-products were imported from a foreign country: *Provided*, That all waste material may be destroyed under Government supervision. All labor performed and services rendered under these provisions shall be under the supervision of a duly designated officer of the customs and at the expense of the manufacturer.

[fol. 20] A careful account shall be kept by the collector of all merchandise delivered by him to any bonded manufacturing warehouse, and a sworn monthly return, verified by the customs officers in charge, shall be made by the manufacturer containing a detailed statement of all imported merchandise used by him in the manufacture of exported articles.

Before commencing business the proprietor of any manufacturing warehouse shall file with the Secretary of the Treasury a list of all the articles intended to be manufactured in such warehouse, and state the formula of manufacture and the names and quantities of the ingredients to be used therein.

Articles manufactured under these provisions may be withdrawn under such regulations as the Secretary of the Treasury may prescribe for transportation and delivery into any bonded warehouse at an exterior port for the sole purpose of immediate export therefrom: *Provided*, That cigars manufactured in whole of tobacco imported from any one country, made and manufactured in such bonded manufacturing warehouses, may be withdrawn for home consumption upon the payment of the duties on such tobacco in its condition as imported under such regulations as the Secretary of the Treasury may prescribe, and the payment of the internal-revenue tax accruing on such cigars in their condition as withdrawn, and the boxes or packages containing such cigars shall be stamped to indicate their character, origin of tobacco from which made, and place of manufacture.

The provisions of section 1351 of Title 26 shall, so far as may be practicable, apply to any bonded manufacturing warehouse established under this chapter and to the merchandise conveyed therein.

Distilled spirits and wines which are rectified in bonded manufacturing warehouses, class six, and distilled spirits which are reduced in proof and bottled in such warehouses, shall be deemed to have been manufactured within the meaning of this section, and may be withdrawn as hereinbefore provided, and likewise for shipment in bond to Puerto Rico, subject to the provisions of this section, and under such regulations as the Secretary of the Treasury may prescribe, there to be withdrawn for consumption or be rewarehoused and subsequently withdrawn for consumption: *Provided,* That upon withdrawal in Puerto Rico for consumption, the duties imposed by the customs laws of the United States shall be collected on all imported merchandise (in its condition as imported) and imported containers used in the manufacture and putting up of such spirits and wines in such warehouses: *Provided further,* That no internal-revenue tax shall be imposed on distilled spirits and wines rectified in class six warehouses if such distilled spirits and wines are exported or shipped in accordance with the provisions of this section, and that no person rectifying distilled spirits or wines in such warehouses shall be subject by reason of such rectification to the payment of special tax as a rectifier. (June 17, 1930, c. 497, Title III, § 311, 46 Stat. 691; June 26, 1936, c. 830, Title IV, § 404, 49 Stat. 1960.)

[fol. 21]

EXHIBIT B TO COMPLAINT

STATE OF NEW YORK
DEPARTMENT OF LAW
ALBANY

Louis J. Lefkowitz
Attorney General

June 30, 1960

State Liquor Authority
270 Broadway
New York, N.Y.
Attention Hyman Amsel, Esq., Counsel

Dear Sirs:

You have by letter of April 22, 1960, supplemented by letter of May 9, 1960, requested my opinion whether the transactions you describe in your request constitute a sale under the Alcoholic Beverage Control Law, and thus require a license from the State Liquor Authority. You further ask what type of license is required, if any.

As set forth in your letter of inquiry, the facts are that Idlewild Bon Voyage Liquor Corporation is a New York corporation and lessee under lease from the New York Port Authority of space 16 feet wide and 30 feet 4 inches in depth on the second floor of the new Arrivals building at New York International Airport, Idlewild. The lessee proposes to use the front portion of the space as an office where orders for liquor will be taken for a passenger departing by plane from the United States, and where payment will be made therefor. A portion of the leased space will be used for storage and display of the liquor (purchased by the corporation from suppliers from stock held by the suppliers in bond) and will remain under bond and under supervision of the Bureau of Customs at all times until delivery to the airplane. The liquor is to be shipped by the lessee from the United States on the plane on which the passenger departs, but is not to be delivered to the passenger until he reaches his foreign destination. Ship-

ment is to be on documents approved for export by the Federal Government. The United States Bureau of Customs has indicated that it treats this transaction as an export within the meaning of § 311 of the Tariff Act of 1930.

It is my opinion that under the present provisions of the Alcoholic Beverage Control Law, this transaction constitutes a "sale" or "selling" within the State of New York. The definitions of "sale" and "selling" under this statute are broad and appear to cover the soliciting and receiving [fol. 22] of an order, such as is here involved, even though delivery is not made within the State. The provision is as follows (Alcoholic Beverage Control Law § 3[28]):

> "'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

The Alcoholic Beverage Control Law (§ 100[1]) further provides:

> "No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter."

Accordingly, in my opinion, the transaction involved is a sale or selling, and consequently cannot be conducted without obtaining an appropriate license.

In answer to your query as to the type of license required, seemingly the Alcoholic Beverage Control Law and the rules of the State Liquor Authority do not at present afford any license for this type of transaction.

Obviously this is not a sale for consumption on the premises. Broadly speaking, it is a sale for consumption off the premises. However, the corporation is not eligible for a license for off premises consumption. For one thing, Rule 17 of the Rules of the State Liquor Authority constitutes an order that there shall be no licenses issued within the counties of the city of New York for sale at retail of alcoholic beverages for off premises consumption. But even if the Liquor Authority were to amend this rule at this time for the purpose of licensing this particular operation, the premises physically do not meet the qualification for such a license. Such qualifications are contained in § 105(2) of the Alcoholic Beverage Control Law and are as follows:

> [fol. 22a] "No premises shall be licensed to sell liquors and/or wines at retail for off premises consumption, unless said premises shall be located *in a store, the entrance to which shall be from the street level and located on a public thoroughfare in premises which may be occupied, operated or conducted for business, trade or industry or on an arcade or sub-surface thoroughfare leading to a railroad terminal.*" [Italics mine.]

The premises here do not meet the requirements of the above statutory provision which I have italicized.

I conclude that without an amendment to the Alcoholic Beverage Control Law to specifically except this type of transaction from § 3(28) of the statute and/or to make provision for a special permit for such transactions, the transaction you describe must be construed a "sale" or "selling" and may not be conducted in the State of New York at this time, because there is no provision for a license therefor, and no alcoholic beverages in this State can be sold without a license.

Very truly yours,

/s/ Louis J. Lefkowitz
Attorney General

[fol. 23]

EXHIBIT C TO COMPLAINT

STATE OF NEW YORK

EXECUTIVE DEPARTMENT
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

STATE LIQUOR AUTHORITY
270 BROADWAY
NEW YORK 7

IN REPLYING REFER TO

(Emblem)

July 11, 1960

Kelly & Schwartz, Esqs.
1780 Broadway
New York 19, New York

Re: Idlewild Bon Voyage
Liquor Corporation

Dear Sirs:

This is in reply to your letters to the State Liquor Authority with respect to the proposed operations by the above corporation at the New York International Airport (Idlewild).

The Members of the Authority have determined at their meeting held on July 7, 1960, that the operation by your client is in conflict with the Laws of the State of New York and, therefore, would be illegal.

Enclosed is a copy of the opinion of the Attorney General of the State of New York dated June 30, 1960, to whom this matter was submitted.

Very truly yours,

STATE LIQUOR AUTHORITY

/s/ HYMAN AMSEL
Counsel

HA:cm
Enclosure

[fol. 24]

COPY

EXHIBIT D TO COMPLAINT

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
ALBANY 1, N. Y.

August 2, 1954

TO ALL LIQUOR AND WINE DISTRIBUTORS:

There has been some confusion in the industry concerning the sales of wine and liquor to various airlines where the merchandise is delivered at airports within the State of New York. In order to overcome this confusion, this letter is being addressed so you may know that since January 1, 1954 all sales of wine and liquor to airline companies delivered within the State of New York are subject to the New York State tax except the following:

1. Sales in United States Customs Bond.
2. Sales of wine and liquors where the merchandise is stored in Class 6 Warehouse under Federal Regulations.
3. Domestic wines and liquors which will be sold to the airlines under benefit of a drawback of the Federal taxes by the distiller.

Very truly yours,

STATE TAX COMMISSION

By: John J. Purcell
Assistant Director

[fol. 25] Section 424, subdivision 1(f) of the New York State Tax Law reads as follows:

"§424. *Taxes imposed.*—1. There are hereby levied and imposed the following excise taxes:

"(f) One dollar and fifty cents per gallon upon all other liquors, when sold or used within this state by a distributor, * * * except when sold or used under such circumstances that this state is without power to impose such tax * * * ."

[fol. 26]

EXHIBIT E TO COMPLAINT

Section 3, subdivision 28 of the Alcoholic Beverage Control Law provides:

"§3. *Definitions*

"Whenever used in this chapter, unless the context requires otherwise:

* * * *

"28. 'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

Section 62 of the Alcoholic Beverage Control Law provides:

"§62. *Wholesaler's liquor license*

"Any person may apply to the liquor authority for a license to sell liquor at wholesale. Such application shall be in writing and verified and shall contain such information as the liquor authority shall require. Such application shall be accompanied by a certified check, bank officers' check or draft, or money order for the amount required by this article for such license. If the liquor authority shall deny the application it shall return the fee to the applicant, less fifteen dollars. If the liquor authority shall grant the application it shall

issue a license in such form as shall be determined by its rules. Such license shall contain a description of the licensed premises and in form and in substance shall be a license to the person therein specifically designated to sell liquors at wholesale in the premises therein specifically licensed to duly licensed wholesalers, retailers and permittees in this state, and to sell liquor in bulk to a licensed rectifier or to a permittee engaged in the manufacture of products which are unfit for beverage use, for use in the manufacture of products produced and sold by such rectifier or permittee, and to sell or deliver liquor to persons outside the state pursuant to the laws of the place of such sale or delivery. Such a license shall also include the privilege to sell wine at wholesale under the same terms and conditions without the payment of any additional fee. As amended L.1947, c. 132; L.1951, c. 581, §3, eff. April 6, 1951."

[fol. 27] Section 100, subdivisions 1 and 2 of the Alcoholic Beverage Control Law provides:

"§100. *Alcoholic beverages generally*

"1. No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter.

"2. No manufacturer and no wholesaler shall sell, or agree to sell or deliver in this state any alcoholic beverage for the purposes of resale to any person who is not duly licensed pursuant to this chapter to sell such beverages, at wholesale or retail, as the case may be, at the time of such agreement and sale."

[fol. 28]

EXHIBIT F TO COMPLAINT

Section 121 of the Alcoholic Beverage Control Law provides:

"§121. *Review by courts*

"The following actions by the liquor authority shall be subject to review by the supreme court in the manner provided in article seventy-eight of the civil practice act or by any other appropriate remedy provided that no stay shall be granted pending the determination of the matter except on notice to the liquor authority and for a period not exceeding thirty days:

"1. Refusal by the liquor authority to issue a license or a permit.

"2. The issuance of a license or permit by the liquor authority contrary to the recommendations of a local board.

"3. The issuance of a license or permit by the liquor authority where the recommendation of a local board was not unanimous.

"4. The revocation, cancellation or suspension of a license or permit by the liquor authority.

"5. The failure or refusal by the liquor authority or a local board to render a decision within the time required by section one hundred twenty.

"6. The transfer by the liquor authority of a license or permit to any other premises, or the failure or refusal by the liquor authority to approve such a transfer.

"7. The issuance of an order of warning by the liquor authority.

"8. Refusal to approve alteration of premises. As amended L.1952, c. 428; L.1954, c. 350; L.1959, c. 400, eff. April 15, 1959.

"Proceedings to review any action enumerated herein shall be entitled to a preference. As amended L.1938, c. 329, §5; L.1940, c. 648, eff. April 19, 1940."

[fol. 29] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civil 2902

[Title omitted]

NOTICE OF AND MOTION TO DISMISS COMPLAINT
—Filed July 26, 1960

Sirs:

Please take notice that the undersigned will move this Court, at a stated term for motions to be held in Room 506 of the United States Court House, Foley Square, City of New York, on the 2nd day of August, 1960, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12 of the Federal Rules of Civil Procedure, dismissing the complaint on the grounds that it fails to state a claim against the defendants upon which relief can be granted because:

(1) It presents no actual controversy;

(2) It fails to state a cause of action;

(3) It fails to present any real or substantial Federal question.

(4) The state courts afford a plain, speedy and efficient remedy by suit for injunction to the plaintiff and that the construction of the State Statutes should first be determined by the State Courts; and

(5) Alcoholic Beverage Control Law § 3, subd. 28, § 62 and § 100, subds. 1 and 2, and related sections, are not unconstitutional.

[fol. 30] The undersigned will further move, pursuant to said Rule 12, for an order dismissing the complaint on the ground that the Court lacks jurisdiction over the subject

matter, because the complaint fails to show that plaintiff has been deprived of any right secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Please take further notice that the undersigned will at the same time and place move for such other, further and different relief as to the Court may seem just and proper.

Dated: New York, N. Y., July 25, 1960.

Yours, etc.,

Louis J. Lefkowitz, Attorney General of the State of New York, Attorney for Defendants, Office & P. O. Address, 80 Centre Street, New York 13, New York.

To: Kelly & Schwartz, Esqs., Attorneys for Plaintiff, 1780 Broadway, New York 19, New York.

[fol. 31] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

#223

60 Civ. 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Plaintiff,

—against—

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York, Defendants.

OPINION—November 4, 1960

BICKS, *District Judge.*

Plaintiff, a New York corporation, conducts business from premises it occupies at the New York International Airport, County of Queens, pursuant to a lease by the terms of which the demised premises may be used only as an office for the receipt of orders for export of United States customs bonded wines and liquors. The defendants constitute the New York State Liquor Authority, an administrative agency created under Article 2 of the Alcoholic Beverage Control Law of the State of New York.

Wines and liquors sold by the plaintiff are not for consumption in the State of New York or in any other state, territory or possession of the United States.

[fol. 32] The premises occupied by plaintiff have been approved by and are under the supervision of the United States Bureau of Customs. The wines and liquors sold by plaintiff are purchased solely for export from vendors who withdraw the same from Class 6 United States Government bonded manufacturing and United States Customs bonded warehouses for rewarehousing at the United States Customs-controlled space in plaintiff's leased premises.

Every bottle withdrawn by plaintiff is, pursuant to the provisions of the Internal Revenue Code and applicable regulations thereunder, labeled "Bottled for export from the U.S.A." Plaintiff complies as well with §311 of the Tariff Act as amended, 19 U.S.C.A. §1311, §5301 of the Internal Revenue Code and the regulations promulgated under each of said statutes, the design and purpose whereof being to prevent diversion of any of the bonded wines and liquors to any use other than export from the United States.

Plaintiff receives orders and payment at its premises at the airport from passengers departing by non-stop planes destined for foreign countries. The merchandise is delivered to the air line with approved documents for foreign export, delivery to be made to the passenger-purchaser only upon arrival at the foreign destination. The passenger is [fol. 33] thus enabled to export for delivery to himself upon arrival abroad, a quantity of liquor not exceeding the maximum permitted for duty free import at the point of disembarkation, at a substantial saving. The Treasury Department has expressly approved these procedures and has ruled that sales so consummated constitute an exportation of merchandise within the meaning of §311 of the Tariff Act.

Plaintiff made inquiry of the New York State Liquor Authority whether conduct of its business in the manner above set forth contravenes the New York State Alcoholic Beverage Control Law. Before replying, the State Liquor Authority asked the New York State Attorney General for an opinion. He ruled (See 1960, Op. Atty. Gen. June 30) that the business of the plaintiff constituted sales or selling within the meaning of §3(28) of the New York State Alcoholic Beverage Control Law;[1] that said law contains no

[1] Sec. 3(28) provides as follows:

"'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

provision that would authorize issuance of a license to plain-
[fol. 34] tiff to conduct its business, and that under §100 (1)[2] of the State Law no person is permitted to sell any alcoholic beverage within the state without a license. The New York Importers & Distillers Association circularized its members advising that in view of the position of the Attorney General and of §62 of the Alcoholic Beverage Control Law, they could not legally fill plaintiff's orders. Plaintiff has not since been able to make purchases to meet its requirements and faces the prospect of closing its doors, with consequent substantial damage.

Plaintiff urges that §3(28), §62 and §100(1) and (2) of the New York State Alcoholic Beverage Control Law, as sought to be applied to it are repugnant to (i) the commerce clause, (ii) the clause prohibiting a state from laying imposts or duties on imports or exports without the consent of Congress, and (iii) the supremacy clause of the constitution and therefore unconstitutional. These contentions rest on the claim that the Tariff Act of 1930 as amended, and the regulations adopted thereunder, taken together with the applicable provisions of the Internal Revenue Code, constitute a comprehensive, exclusive and preemptive scheme duly adopted by Congress for the regu-
[fol. 35] lation, encouragement and promotion of foreign commerce in, and export of, bonded wines and liquors.

Plaintiff seeks declaratory and injunctive relief and has moved for the impanelling of a three-judge district court pursuant to 28 U.S.C.A. §§2281, 2284.

The threshold issue is whether the federal courts should accept jurisdiction now since the issues have never been presented to or passed upon by the state courts. In a series of cases beginning with *Railroad Comm'n* v. *Pullman Co.*, 1941, 312 U.S. 496, the Supreme Court has set out the procedure for resolving constitutional issues which are reasonably open to construction. " * * * [N]o principle has found more consistent or clear expression than that the federal

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[2] Sec. 100(1) provides:

"No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter."

courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. See, e.g., *Railroad Comm'n* v. *Pullman Co.*, supra; *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U.S. 168; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101; *American Federation of Labor* v. *Watson*, 327 U.S. 582; *Shipman* v. *Du Pre*, 339 U.S. 321; *Albertson* v. *Millard*, 345 U.S. 242; *Government & Civic Employees* v. *Windsor*, [fol. 36] 353 U.S. 364. This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication. See *Chicago* v. *Fieldcrest Dairies, Inc.*, supra, at 172-173." *Harrison* v. *N.A.A.C.P.*, 1959, 360 U.S. 167, 176-177. "Reflected among the concerns which have traditionally counseled a federal court to stay its hand are the desirability of avoiding unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions. * * *" *Martin* v. *Creasy*, 1959, 360 U.S. 219, 224.

The controversy between Idlewild and the Liquor Authority comes to the court in precisely the tentative and hypothetical posture with which *Pullman* and its progeny are concerned. The State Attorney General rendered an opinion and acting upon that opinion the Liquor Authority advised plaintiff that its operation is "illegal". Neither the Attorney General's opinion nor the action of the Liquor Authority has been reviewed in the State Courts.

State court interpretation of state policies is especially desirable where the statute in question "provides a unified [fol. 37] method for the formation of policy and determination of cases by the [state administrative body] * * * and by the state courts." *Burford* v. *Sun Oil Co.*, 1943, 319 U.S. 315, 333, 334.

The Alcoholic Beverage Control Law provides a comprehensive and unified scheme for the regulation and control of the sale and distribution of liquor through the State Liquor Authority. The Authority has broad discretionary powers to license the sale of liquor at wholesale and retail,

to limit, revoke or suspend outstanding licenses, to specify standards of manufacture and fermentation, to hold hearings and subpoena witnesses, and to promulgate rules and regulations to promote the foregoing functions. Alcoholic Beverage Control Law, §17, *John J. King, Inc.* v. *O Connell*, 1952, 280 App. Div. 852; *Application of Gambino*, 1957, 4 A. D. 2d 37; *Berkowitz* v. *Rohan*, 1959, 193 N.Y.S. 2d 345.

In *Burford*, supra, where the validity of Texas oil drilling permits was attacked in the federal court, the Supreme Court, characterizing the Texas statutes under which the permits were granted as "part of the general regulatory system devised for the conservation of oil and gas", 319 U.S. at 318, indicated that "question[s] of regulation of the industry by the state administrative agency * * * so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the [fol. 38] first opportunity to consider them." 319 U.S. at 332.

"[N]o matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination * * * In this situation, a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication." *Railroad Commission* v. *Pullman Co.*, supra, at 499-500. In the light of the circumstances of this case §§3(28), 62 and 100(1) and (2) may be construed by the state courts to avoid or transform the issues raised herein. See, e.g., *During* v. *Valente*, 267 App. Div. 383.

Martin v. *Creasy*, 1959, *supra*, teaches that irreparable injury, vel non, the District Court should not adjudicate a constitutional issue presented in a hypothetical posture. In that case, plaintiffs sought immediate relief from alleged irreparable injury as the result of the operation of Pennsylvania's limited access highway statute. Impressed by allegations of immediate irreparable harm similar to those urged by plaintiff on this motion, the District Court was persuaded that refusal to exercise jurisdiction would cause plaintiffs to "suffer substantial financial losses during the time it would take to litigate the constitutionality of the [fol. 39] statute in the State Courts, which losses could never be recouped if the statute were eventually declared

to be unconstitutional." *Creasy* v. *Stevens*, D.C. W.D. Penna., 1958, 160 F. Supp. 404, 409, *reversed*, *Martin* v. *Creasy*, *supra*. The Supreme Court held, "[a]ssuming that there was a basis to support intervention by a court of equity, the District Court should nevertheless have declined to adjudicate this controversy." *Martin* v. *Creasy*, *supra*, at 224.

Although the substantive issues raised in the complaint may not be considered by the judge to whom application under 28 U.S.C.A. §2281 is made, he has the power to retain jurisdiction pending state court adjudication where, as here, there is insufficient basis to support intervention by a federal court of equity. *Snyder's Drug Stores* v. *Taylor*, 8th Cir., 1955, 227 F. 2d 162; *Island Steamship Lines, Inc.* v. *Glennon*, D.C. Mass., 1959, 178 F. Supp. 292, 295, 296; *Linehan* v. *Waterfront Commission of New York Harbor*, D.C. S.D.N.Y., 1953, 116 F. Supp. 401.

Motion for impanelling of a three-judge court denied, with leave to renew after the state court has ruled.

So ordered.

Dated: November 4, 1960.

Alexander Bicks, United States District Judge.

[fol. 40] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

#705

60 Civ. 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Plaintiff,

—against—

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York, Defendants.

MEMORANDUM OPINION—December 28, 1960

DIMOCK, *D.J.*

Plaintiff makes two motions, one for an injunction restraining defendants, constituting officials of the New York State Liquor Authority, from taking any action to hinder, harass or in any manner interfere with plaintiff or plaintiff's business during the pendency of this action, and the other to quash a subpoena issued by defendants requiring appearance and production of records by plaintiff.

The action is one for declaratory judgment that, as applied to plaintiff, section 3 subdivision 28, section 62, and section 100 subdivisions 1 and 2 of the Alcoholic Beverage Control Law of the State of New York and all other provi- [fol. 41] sions of said law which defendants might claim would affect plaintiff's operation are unconstitutional under the commerce clause, U.S. Const. art. 1, §8, and the clause prohibiting states from imposing duties on imports and exports without the consent of Congress, U.S. Const. art. 1, §10, and as being preempted by the Tariff Act of 1930, 19 U.S.C. §1311, and by associated provisions of the Internal Revenue Code, 26 U.S.C. §§5521 and 5522. The complaint

also seeks an injunction against the enforcement of those provisions of the Alcoholic Beverage Control Law.

A motion for a preliminary injunction in the terms of that prayed for in the complaint was denied by Judge Bicks with an opinion dated November 4, 1960.

Insofar as the present motion seeks a preliminary injunction it is a mere renewal of the motion made before Judge Bicks. An appeal from his order denying that motion is now pending undetermined in the Court of Appeals. That appeal removed the subject matter of the motion for a preliminary injunction from this court to the Court of Appeals and this court is without jurisdiction to issue a preliminary injunction in those terms. Rico Mfg. Co., Inc. v. Trico Products Corp., 1 Cir., 75 F.2d 706, 707; Brick v. A. I. Namm & Sons, Inc., D.C.E.D.N.Y., 21 F.2d 179. Doubtless the appeal would not have that effect if a state of facts which might have warranted a different decision by Judge Bicks were presented. The sole reason assigned by Judge Bicks for denial of the motion was, however, that plaintiff had not [fol. 42] exhausted the state remedies open to him. Nothing has occurred since the decision which would tend to obviate the necessity of exhausting state remedies. I am thus without jurisdiction to grant an injunction pendente lite.

Plaintiff, however, seeks in the alternative an injunction pending appeal. No such application was ever made to Judge Bicks so that the question is an open one. I do not regard it as the same as the question which he decided when he denied the motion for an injunction pendente lite. Less need be shown to warrant an injunction pending appeal than one for an injunction pendente lite.

In support of this branch of its application plaintiff invokes Rule 62(c) F.R.Civ.P. which provides:

> "(c) Injunction pending appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."

Plaintiff has a place of business in Idlewild Airport. I will describe its business as plaintiff describes it in its papers. Its customers are prospective travelers to foreign countries from Idlewild Airport. They order and pay for liquor which plaintiff places on the plane with the passenger but to which the passenger has no access until his arrival in the foreign country. This liquor comes from Government [fol. 43] bonded warehouses under bond until delivery on board the airplane and is not subject to United States tax so that it can be purchased at a substantial saving. Plaintiff has made arrangements with the United States Customs Bureau and the Internal Revenue Department under which permission to carry on this business has been granted.

The Attorney General of the State of New York has issued an opinion to the effect that the business so carried on by plaintiff is unlawful under the New York Alcoholic Beverage Control Law. Defendants have therefore advised plaintiff that they have determined that the operation of plaintiff's business is in conflict with the laws of the State of New York and is therefore illegal. Plaintiff made proof before Judge Bicks that the New York Importers & Distillers Association had circularized its members advising that, in view of the position of the Attorney General, under section 62 of the Alcoholic Beverage Control Law, they could not legally fill plaintiff's orders. Judge Bicks found that plaintiff has not since then been able to make purchases or meet its requirements and that it faces the prospect of closing its doors with consequential damage.

In spite of this, Judge Bicks refused a preliminary injunction pendente lite because plaintiff did not exhaust the state remedies available to it. Were the question before me the same as that before Judge Bicks, even had I jurisdiction to pass on the question and reach a different result I would be constrained to follow Judge Bicks. The question before me is not, however, the same. The application before [fol. 44] him was for an injunction pending trial and I am now considering an application for an injunction pending appeal. The hardship to the defendant of an injunction pending appeal is lighter than the injunction pending trial by just so much as the duration of the injunction pending trial exceeds the duration of an injunction pending appeal.

Thus I may consider the application for an injunction pending appeal as a new question. I find that the hardship to plaintiff in the disruption of its business outweighs such hardship as the Liquor Authority might suffer during the comparatively short period of time required for the presentation and decision of the appeal. Plaintiff has presented evidence that defendants have notified at least one of the truckers delivering merchandise to plaintiff that the trucker is assisting in violations of the law and that the trucker is consequently refusing to make deliveries. Defendants openly avow their purpose to obtain, by means of a subpoena which has been served, the names of those who are supplying merchandise to plaintiff and it is a fair inference that the suppliers will be warned against aiding and abetting the performance of the allegedly illegal acts. Plaintiff certainly raises a serious legal issue when it states that what New York is regarding as unlawful has been ruled by the United States to be lawful foreign commerce. Plaintiff is entitled to an injunction against harassment by defendant pending the appeal from the order of Judge Bicks.

There remains the matter of the motion to quash the subpoena. An affidavit submitted on behalf of defendants states [fol. 45] that the purpose of the examination sought is two-fold: first, to get the names of plaintiff's suppliers and, second, to ascertain whether plaintiff is violating the law.

Plaintiff is entitled, for the reasons above set out, to an injunction pending the appeal forbidding communication by defendants with any of plaintiff's suppliers whose names appear in any evidence or testimony obtained by plaintiff as a result of the subpoena and the injunction will so provide.

I pass now to the phase of the motion to quash the subpoena directed at the subpoena insofar as it seeks merely an examination on the subject of violations of law by plaintiff. Even if I were disposed to grant that relief I could not do so in this law suit. Neither by its allegations of fact nor by its prayer does the complaint raise any issue as to defendants' right to subpoena plaintiff to give testimony as to whether it is conducting operations more extensive than those for which plaintiff seeks protection.

Since the injunction will protect plaintiff, pending the appeal, against use against it of the fruits of the subpoena insofar as they constitute evidence with respect to its avowed activities and since I have no power in this law suit to quash the subpoena insofar as it seeks evidence of other alleged infractions of law, the motion to quash will be denied.

Settle order on notice. Bond in the sum of $1,000 will be required. All existing stays are continued pending entry of the order.

Dated: December 28, 1960

E. J. Dimock, United States District Judge.

[fol. 46] [File endorsement omitted]

Notice of Entry of Order—Filed January 6, 1961 (omitted in printing).

[fol. 47]

In United States District Court

Southern District of New York

60 Civil. 2902

Idlewild Bon Voyage Liquor Corporation, Plaintiff,

—against—

Thomas E. Rohan, Martin C. Epstein, William H. Morgan, Grant F. Daniels and Samuel M. Birnbaum, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York, Defendants.

Order—January 4, 1961

The plaintiff having moved for an order temporarily enjoining and restraining defendants, and each of them, from

taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of this action or, in the alternative, during the pendency of the plaintiff's appeal from the decision and order of the Honorable Alexander Bicks herein, dated November 4, 1960; and the plaintiff having further applied for, and renewed its application for, the empanelling of a three-judge court; and the plaintiff having further applied for an order quashing a certain subpoena *duces tecum*, dated November 22, 1960 and returnable November 29, 1960, directed to the plaintiff, and issued by the New York State Liquor Authority of which the defendants are the Chairman, Members and Commissioners respectively; and said motions having duly come on to be heard before me on December 7, 1960; and Kelly & Schwartz, attorneys for plain-[fol. 48] tiff, by Charles H. Tuttle, Esq., having appeared in support thereof, and Louis J. Lefkowitz, Esq., attorney for defendants, by Philip Watson, Esq., having appeared in oposition thereto;

Now, on reading and filing the plaintiff's application to quash the aforesaid subpoena *duces tecum* by order to show cause issued by the Honorable Eloyd F. MacMahon on November 25, 1960, the affidavit of Charles H. Tuttle, verified November 25, 1960, together with the exhibits annexed thereto, in support of the said application, and the affidavit of Walter C. Schmidt, verified December 2, 1960, in opposition thereto; the plaintiff's supplemental notice of motion, dated December 1, 1960, for a temporary injunction and for other relief, as aforesaid, the supplemental affidavit of Charles H. Tuttle, verified December 1, 1960, the affidavit of John F. Kelly, verified December 1, 1960, and the affidavit of John F. Kelly, verified December 5, 1960, all in support of the said motion, and the affidavit of Philip Watson, verified December 5, 1960, in opposition thereto, and due deliberation having been had thereon, and on filing the opinion of the Court, dated December 28, 1960, it is hereby

Ordered that the plaintiff's motion for a temporary injunction pending the trial of this action and for the empanelling of a three-judge court be, and the same hereby is, denied, and it is further

Ordered that the plaintiff's application to quash the aforesaid subpoena *duces tecum* be, and the same hereby is, denied; it is further

Ordered that the plaintiff's motion for an order temporarily enjoining and restraining the defendants, from tak-
[fol. 49] ing any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of the plaintiff's appeal from the decision and order of the Honorable Alexander Bicks herein, dated November 4, 1960, be, and the same hereby is, granted, and the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them are hereby enjoined and restrained from taking any action to hinder, harass, or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of the aforesaid appeal, and it is further

Ordered that the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them, are hereby enjoined and restrained from communicating with respect to the plaintiff or the plaintiff's business with any of the plaintiff's suppliers whose names appear in any evidence or testimony which may be obtained from the plaintiff as a result of the aforesaid subpoena *duces tecum;* and it is further

Ordered that the plaintiff will be required to post a bond in the sum of One Thousand Dollars ($1,000.00) pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

Dated: New York, N. Y., January 4th, 1961.

E. J. Dimock, U. S. D. J.

[fol. 50] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
60 Civil 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Plaintiff,

—against—

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York, Defendants.

RESTRAINING ORDER—April 25, 1961

The plaintiff having moved by order to show cause dated April 18, 1961, for an order convening a District Court of three judges pursuant to 28 U. S. C. §2281 for the hearing of this cause and for an injunction, both preliminary and permanent, restraining the defendants from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business, and for other relief, and said motions having duly come on to be heard before me on April 25, 1961; and Kelly & Schwartz, attorneys for plaintiff by Charles H. Tuttle, Esq., having appeared in support thereof, and Louis J. Lefkowitz, Esq., attorney for defendants, by Philip Watson, Esq., having appeared in opposition thereto;

Now, on reading and filing plaintiff's aforesaid application by order to show cause issued by Honorable John M. Cashin on April 18, 1961; and the affidavit of Charles H. Tuttle, verified April 18, 1961, together with the exhibits [fol. 51] annexed thereto, in support of the said application, and after hearing argument by Charles H. Tuttle, Esq., in support of the said application and by Philip Watson, Esq., in opposition thereto, and it appearing to the Court that the plaintiff may be irreparably damaged unless the Court con-

tinues the temporary injunction heretofore granted by the Honorable Edward J. Dimock herein by order dated January 4, 1961 pending the determination of plaintiff's aforesaid application for the convening of a three-judge District Court, it is hereby

Ordered, that the plaintiff's motion for an order temporarily enjoining and restraining the defendants from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business pending the decision on the plaintiff's application for an order convening a three-judge Court herein be, and the same hereby is, granted, and the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them are hereby enjoined and restrained from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business pending the determination of the aforesaid application, and it is further

Ordered, that the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them, are hereby enjoined and restrained from communicating with respect to the plaintiff or the plaintiff's business with any of the plaintiff's suppliers whose names appear in any evidence or testimony which may be obtained [fol. 52] from the plaintiff by the defendants; and it is further

Ordered that the bond in the sum of $1,000, heretofore posted by the plaintiff pursuant to the order of the Honorable Edward J. Dimock herein, dated January 4, 1961, shall be proper security pursuant to Rule 65(c) of the Federal Rules of Civil Procedure.

Dated: New York, N. Y., April 25, 1961.

Signed at 5:15 P.M., John M. Cashin, U.S.D.J.

John M. Cashin, U. S. D. J.

[fol. 53] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civ. 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Plaintiff,

—against—

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York, Defendants.

Appearances:

Kelly & Schwartz, Esqs., Attorneys for Plaintiff, 1780 Broadway, New York, N. Y.; Charles H. Tuttle, Esq.; John F. Kelly, Esq.; Stoddard B. Colby, Esq.; Stuart H. Johnson, Jr., Esq., of Counsel.

Hon. Louis J. Lefkowitz, Attorney General of the State of New York, Attorney for Defendants, 80 Centre Street, New York, N. Y.; Philip Watson, Esq., Assistant Attorney General, of Counsel.

OPINION—May 3, 1961

CASHIN, *D.J.*

This is a motion to impanel a three-judge district court [fol. 54] pursuant to 28 U.S.C. § 2281 brought on by an order to show cause. The plaintiff, a New York corporation, is engaged in selling bottled wines and liquors solely for export to overseas passengers from premises at Idlewild Airport. The defendants are the Chairman, Members and Commissioners of the New York State Liquor Authority.

The liquor sold by plaintiff is placed upon the passengers' planes for delivery only upon arrival at their foreign destinations. The liquor cannot be diverted for any purpose other than export from the United States. The United States Treasury Department, Bureau of Customs, has approved plaintiff's procedures and has ruled that plaintiff's business constitutes the exportation of merchandise within the meaning of Section 311 of the Tariff Act of 1930, 19 U.S.C. § 1311.

The United States Bureau of Customs has approved and supervises the plaintiff's premises. The liquors sold by plaintiff are purchased solely for export from vendors who withdrew the same from Class 6 United States Government bonded manufacturing and United States Customs bonded warehouses for re-warehousing at the United States Customs-controlled space in plaintiff's premises. Pursuant to the Internal Revenue Code, each bottle plaintiff withdraws is labeled "Bottled for export from the U.S.A.".

Plaintiff sought a ruling from the New York State Liquor Authority as to whether its conduct set forth above con- [fol. 55] travenes the New York State Alcoholic Beverage Control Law. The State Liquor Authority sought and obtained an opinion from the New York State Attorney General (See 1960, Op. Atty. Gen. June 30) which was to the effect that the plaintiff's business constituted a "sale" within the meaning of the Alcoholic Beverage Control Law, § 3(28); that there is no provision of that law which would authorize a license for such sales, and that no person can sell alcoholic beverages within New York without a license. Thereafter, the New York Importers and Distillers Association circularized its members advising that in view of the position of the Attorney General and of § 62 of the Alcoholic Beverage Control Law they could not legally fill plaintiff's orders.

This action was then instituted on July 22, 1960. The plaintiff urged at that time that the provisions of the New York State Alcoholic Beverage Control Law are unconstitutional, as applied to plaintiff, under (i) the Commerce clause; (ii) the clause prohibiting a State from laying imposts or duties on imports and exports without the consent of Congress; and (iii) the Supremacy clause of the Constitution of the United States. Plaintiff argued at that time

that the 1930 Tariff Act as amended, the regulations adopted thereunder, and the applicable provisions of the Internal Revenue Code, constituted a comprehensive, exclusive and preemptive scheme duly adopted by Congress for the regulation, encouragement and promotion of foreign commerce in bonded liquors.

[fol. 56] Plaintiff sought declaratory judgment to that effect, injunctive relief, and moved for the impaneling of a three-judge district court pursuant to 28 U.S.C. § 2281, 2284. Judge Bicks of this Court denied plaintiff's motion to impanel a three-judge district court until after a state court has ruled on the constitutional issues (188 F. Supp. 434 (1960)). Plaintiff appealed Judge Bicks' decision and also moved before Judge Dimock of this Court for an injunction restraining defendants from interfering with plaintiff's business during the pendency of this action, and for other relief not germane to the present motion. Judge Dimock refused to grant a preliminary injunction because the request was a mere renewal of the motion made before Judge Bicks. He did, however, issue an injunction against harassment by defendants pending the appeal from the order of Judge Bicks. Thereafter, the plaintiff appealed from the orders of Judge Bicks and Judge Dimock to the Circuit Court of Appeals.

On April 14, 1961 the Court of Appeals handed down its decision (Idlewild Bon Voyage Liquor Corporation v. Rohan (2 Cir. April 14, 1961) —— F. 2d ——). It stated by way of dictum that a three-judge district court should have been convened. It held, however, that in light of *Stratton* v. *St. Louis S.W. Ry.*, 282 U.S. 10 (1930) it was without jurisdiction to hear the appeals and granted defendants' motion to dismiss them. It said that—

> "In Stratton the Court said that, * * *, the district [fol. 57] judge to whom an application was made for injunctive relief from the state activity was required to convene a three-judge district court. The Court held that if he failed to do so and dismissed the application on its merits the proper remedy was a writ of mandamus from the Supreme Court (see e.g., Ex Parte Bransford, 310 U.S. 354 (1940)), for a Court of Ap-

> peals would have no jurisdiction over any matter properly entertainable by a three-judge district court."

As I construe the decision of our Circuit Court of Appeals it said that plaintiff's only remedy was by way of mandamus to the Supreme Court of the United States and, accordingly, dismissed the appeals because it had no jurisdiction to hear them. The mandate in this decision has not, as of this date, come down. It is true that the decision of the Circuit Court of Appeals did say that Judges Bicks and Dimock were in error and that a three-judge district court should have been appointed. However, I consider this as dictum. I consider Judge Bicks' and Judge Dimock's orders as still in full force and effect.

Thereafter, and on April 18, 1961, I signed an order directing defendants to show cause why an order should not be entered convening a three-judge district court pursuant to 28 U.S.C. § 2281. Thus, I have before me the same issue on which Judge Bicks and Judge Dimock have already ruled. Their decisions are still the law of this case.

Plaintiff argues that on the basis of the dictum in the Court of Appeals decision dismissing the appeals from Judges Bicks' and Dimock's decisions, I should now con- [fol. 58] vene a three-judge district court. Defendants urge that plaintiff's motion should be denied because the issues are res judicata and that plaintiff's only remaining remedy in the United States courts is mandamus.

Whether or not I have the power to convene a three-judge district court at this time is questionable. In *In re Hines* (2 Cir. 1937), 88 F. 2d 423, Judge Swan stated:

> "It is well established that a judge may not overrule the decision of another judge of co-ordinate jurisdiction made in the same case. The law enunciated by the first judge is not merely his individual opinion; it is the law of the District Court, to be followed, upon similar facts, until a different rule is laid down by a court of superior jurisdiction. * * * Such a rule is essential to an orderly and seemly administration of justice in a court composed of several judges."

However, it appears that this doctrine has been modified to some extent in *Dictograph Products Company* v. *Sonotone Corporation* (2 Cir. 1956), 230 F. 2d 131, dismissed per stipulation 352 U.S. 883 (1956). (See also *Higgins* v. *California Prune & Apricot Grower* (2 Cir. 1924), 3 F. 2d 896, 898; *First National Bank in Greenwich* v. *National Airlines, Inc.* (2 Cir. April 6, 1961) —— F. 2d ——). However, what was involved in these latter cases was either a non-appealable order or a ruling in the meantime by a higher court on the issue in question.

In the instant case the Court of Appeals, in its decision handed down on April 14, 1961, stated that—

> [fol. 59] "Appellees' argument that this order was not final and hence unappealable under 28 U.S.C. § 1291, 1292 is not well taken. No parallel state actions were pending and there was no state adjudication to await. There was nothing left to be done in the federal courts because the action there had been for all intents and purposes concluded. Appellant was effectively out of court—any action upon its prayer for injunctive relief was indefinitely postponed under these circumstances. There is no bar on this ground to appealability. See Glen Oaks Utilities, Inc. v. City of Houston, 280 F. 2d 330 (5 Cir. 1960)."

Although it is true that since Judge Bicks rendered his decision a higher court has spoken on the matter, that court had no jurisdiction over the subject matter and whatever it said on the matter was dictum.

Assuming, however, that I have the power to overrule Judge Bicks and Judge Dimock, I will not so exercise it. This is not a situation where plaintiff has no other remedy. Plaintiff has other courses open to it. The most obvious is to move before Judge Bicks for reargument in light of the Court of Appeals decision. (See Rule 34 of the General Rules of United States District Courts for the Southern and Eastern Districts of New York.) The other remedy is a writ of mandamus. In *Stratton*, supra, the Supreme Court ruled that where a court of three judges should have been convened and was not, the remedy was a writ of mandamus vacating the order of the District Judge and

directing him to convene a three-judge court. This view has been adhered to in later cases. (*Ex-Parte Bransford*, 310 [fol. 60] U.S. 354 (1940); *Ex-Parte Cogdell*, 342 U.S. 163 (1951).)

Instead of either of these courses, plaintiff has renewed its motion for the impaneling of a three-judge district court. Accordingly, the motion for the appointment of a three-judge court is denied.

It is so ordered.

Dated: New York, N. Y., May 3rd, 1961.

John M. Cashin, United States District Judge.

[fol. 61]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Motions argued February 6, 1961)

Docket No. 26654

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Plaintiff-Appellant,

—v.—

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being ing the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,
Defendants-Appellees.

Before: Lumbard, Chief Judge, Madden, Judge, United States Court of Claims,* and Waterman, Circuit Judge.

Motions to dismiss appeals from orders of the United States District Court for the Southern District of New York, Alexander Bicks, J., Edward J. Dimock, J., denying

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* Sitting by designation.

motions to impanel a three-judge district court, for a preliminary injunction, and to quash a subpoena, and staying further proceedings pending state court adjudication.

Motions to dismiss granted.

[fol. 62] Kelly & Schwartz (Breed, Abbott & Morgan, Charles H. Tuttle, John F. Kelly, Stoddard B. Colby, Stuart H. Johnson, Jr., of counsel), New York City, for Plaintiff-Appellant.

Louis J. Lefkowitz, Attorney General of the State of New York (Philip Watson, Assistant Attorney General, of counsel), Albany, New York, for Defendants-Appellees.

OPINION—April 14, 1961

WATERMAN, Circuit Judge:

Plaintiff filed a complaint against the defendants, members of the State Liquor Authority of the State of New York. It sought declaratory and injunctive relief from actions taken by them pursuant to the New York Alcoholic Beverage Control Law of the State of New York §§3(28), 62 and 100. Plaintiff alleges that defendants' activities were unconstitutional under the U. S. Constitution, being repugnant to (a) the commerce clause, and (b) the clause that prohibits a state, without the consent of Congress, from laying any imposts or duties on imports or exports.

Plaintiff applied to the United States District Court for the Southern District of New York, pursuant to 28 U. S. C. §§2281, 2284, for the convening of a three-judge court to hear and determine the controversy. The single-judge district court issued an order directing the defendants to show cause before a three-judge district court why the relief sought by the plaintiff should not be granted. Before the order to show cause came on to be heard defendants moved to dismiss the complaint. It would appear that the application for the impaneling of a three-judge district court, the order to show cause, and the motion to dismiss were simultaneously heard by Judge Bicks, who [fol. 63] denied the application for a three-judge district court, and, in effect, granted defendants' motion to dismiss

(188 F. Supp. 434 (1960)). The ground for Judge Bicks' action was that no state court had passed upon the constitutional issues raised, and he was of the opinion that the federal courts should abstain from doing so until there had been state adjudication. Implicit in this disposition and opinion is a finding that a substantial federal question existed which could properly be considered by a three-judge district court after some intervening state adjudication. Plaintiff was given leave to renew its motion after a state court had ruled—whenever there should be such a ruling. It should be noted that no state court action involving these parties or these issues was pending at the time.

From this decision and order, *Idlewild Bon Voyage Liquor Corporation* v. *Rohan*, 188 F. Supp. 434 (S. D. N. Y. Nov. 4, 1960) plaintiff filed a notice of appeal, and thereafter plaintiff obtained an order to show cause why defendants should not be enjoined and restrained from interfering with plaintiff's business during the pendency thereof. It also sought to quash an administrative subpoena *duces tecum* the defendants issued under the authority of the New York State Beverage Control Law to appear before defendants with its books, and renewed its application for the impaneling of a three-judge district court. Judge Dimock, after a hearing, granted the motion for the interlocutory injunction pending the appeal; denied the motion to quash; and, relying upon Judge Bicks' decision, refused to impanel a three-judge district court. Appellant appeals to us from the rulings adverse to it entered by both judges. Defendants-appellees have now moved for an order dismissing both appeals on the ground that we lack jurisdiction to hear them.

[fol. 64] We are of the opinion that we must grant appellees' motion and are required to dismiss these appeals for lack of appellate jurisdiction.

I—The Order of Judge Bicks

This order denied the petition to convene a three-judge district court because there had been no prior state adjudication of the issues. The judge relied upon the doctrine of "equitable abstention" originally set forth in *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941) "that the federal courts should not adjudicate the constitutionality

of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them."[1] There was, however, as we have previously pointed out, no state action pending. Judge Bicks "retained jurisdiction" of the litigation pending state court adjudication. Appellees' argument that this order was not final and hence unappealable under 28 U. S. C. §1291, 1292 is not well taken. No parallel state actions were pending and there was no state adjudication to await. There was nothing left to be done in the federal courts because the action there had been for all intents and purposes concluded. Appellant was effectively out of court —any action upon its prayer for injunctive relief was indefinitely postponed under these circumstances. There is no bar on this ground to appealability. See *Glen Oaks Utilities, Inc.* v. *City of Houston*, 280 F. 2d 330 (5 Cir. 1960).

However, the order of Judge Bicks had the effect of dismissing a complaint challenging the constitutionality under the Federal Constitution of a state statute and challenging it because of the way that statute was being ap- [fol. 65] plied by the regulatory commission created by it. *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10 (1930) in clear and unequivocal terms declared that the three-judge district court was meant to be the tribunal to deal with constitutional challenges to state activity. And, recently, in *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73 (1960) the Court reaffirmed this position by holding that even where state activity was challenged on both constitutional and nonconstitutional grounds a three-judge district court was the proper tribunal. In *Stratton* the Court said that, since this was so, the district judge to whom an application was made for injunctive relief from the state activity was required to convene a three-judge district court. The Court held that if he failed to do so and dismissed the application on its merits the proper remedy was a writ of mandamus from the Supreme Court (see e.g., *Ex Parte Bransford*, 310 U. S. 354 (1940)), for a Court of Appeals would

[1] *Harrison* v. *NAACP*, 360 U. S. 167, at 176-77. And see Note, 59 Colum. L. Rev. 749 (1959).

have no jurisdiction over any matter properly entertainable by a three-judge district court. Of course, strict adherence to the *Stratton* command creates obvious difficulties, for whenever there is a pleader's allegation of a constitutional infirmity a single judge is required to request that a three-judge district court be convened. To deal with this problem a procedure has been developed whereby the district judge to whom the application is made is charged with making a preliminary determination as to whether a "substantial federal question" exists that necessitates the convening of a three-judge district court.[2] Judge Friendly, for our court, in *Bell* v. *Waterfront Commission of New York Harbor*, 279 F. 2d 853 (2 Cir. 1960), traces the development of this procedure, and that case holds that an [fol. 66] appeal from a determination that no such substantial federal question exists is properly preferred to the Court of Appeals. Accord, *Stuart* v. *Wilson*, 282 F. 2d 539 (5 Cir. 1960); *Wicks* v. *Southern Pacific Co.*, 231 F. 2d 139 (9 Cir. 1956).

The equitable abstention doctrine referred to by us in this opinion was recently carefully articulated in *Harrison* v. *NAACP*, 360 U. S. 167 (1959), where the Supreme Court remanded a cause for state consideration. The Court reasoned that in order for a federal court to give proper consideration to the issue of constitutionality it should have a finished product before it, i.e., not only the state legislative act but also that act as construed by the state courts. At the same term, in a later opinion, the Court pointed out that a reference of this sort to a state court should not be an automatic reference, *NAACP* v. *Bennett*, 360 U. S. 471 (1959). Moreover, there was no indication that the choice of whether to abstain could be the choice of a single district judge. In *Bennett* the appeal was from and the remand was to a three-judge district court.

The decision to abstain is a very different decision from the preliminary one of determining whether the case involves a substantial federal question. Such a determination, not being automatic, presupposes that the court has

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[2] As previously indicated, a finding that a substantial federal question existed was implicit in Judge Bicks' decision.

jurisdiction to decide the controversy even though it may, after due consideration, choose to surrender temporarily its power to decide. Inasmuch as *Stratton* has made it clear that only a three-judge district court has the requisite jurisdiction to decide a complaint seeking injunctive relief from acts sought to be justified by reliance upon a state statute because the statute, so applied, is repugnant to the federal constitution,[3] we are of the opinion that the determination of whether a federal court ought to abstain is a [fol. 67] determination that may only be made in the first instance by a three-judge district court.[4]

Stratton v. *St. Louis S. W. Ry., supra,* is undeniable authority for the proposition that no appeal may be preferred to a court of appeals from an action taken by a district judge upon an application to convene a three-judge district court unless there first was jurisdiction in the district court over the subject matter ruled upon. Having decided that Judge Bicks had no jurisdiction to proceed as he did, we must conclude from *Stratton* that we have no jurisdiction to entertain an appeal from his decision. To be sure, this result leaves us in a somewhat anomalous position. A court of appeals as a matter of course entertains appeals that claim a lack of jurisdiction in a district court and a court of appeals so importuned has jurisdiction to determine whether the district court's powers, so challenged, were exercised within district court jurisdiction. Anomalous as our position is, we feel bound by the Supreme Court's opinion in *Stratton,* an opinion which that Court has never seen fit to reverse, and to which it has given its approval when construing a companion section, 28 U. S. C. §2282. *Ex Parte Cogdell,* 342 U. S. 163 (1951).

In *Bell* v. *Waterfront Commission of New York Harbor, supra,* we first found that the district court could determine the preliminary question of whether there was a substantial federal question to be adjudicated upon, and there-

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[3] Accord, *Query* v. *United States,* 316 U. S. 486 (1942).

[4] See *Alabama Public Service Comm.* v. *Southern Ry.,* 341 U. S. 341, 350 (1950). Contra, *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims,* 252 F. 2d 317 at 320 (6 Cir. 1958).

fore the court of appeals had jurisdiction to review that preliminary determination. Though the result we reach here of denying to a one-judge district court, and to ourselves, the power similarly to determine a jurisdictional question, [fol. 68] the jurisdictional question itself is a quite dissimilar one,[5] and in determining the issue before us we are constrained to follow *Stratton*. Therefore, since we are of the opinion that a three-judge district court should have been convened, it is our duty to grant the motion to dismiss. Accord, *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317, 319 (6 Cir. 1958).

II—The Order of Judge Dimock

Falsone v. *United States*, 205 F. 2d 734 (5 Cir.), *cert. denied*, 346 U.S. 864 (1953), held that the denial of a motion to quash a subpoena of an administrative agency, unconnected with litigation, is a final order and therefore appealable. In *In Re Albert Lindley Lee Memorial Hospital*, 209 F. 2d 122 (2 Cir. 1953), *cert. denied sub nom. Cincotta* v. *United States*, 347 U. S. 960 (1954), this court expressly followed the *Falsone* case. There would appear, therefore, under ordinary circumstances to be no doubt as to the appealability of an order denying a motion to quash. However, the order before us on appeal was sought below on the ground that the issuance of the subpoena was repugnant to the federal constitution. In such a situation 28 U. S. C. §2281 requires that a three-judge district court be convened if a substantial federal question exists. *Bell* v. *Waterfront Commission of New York Harbor, supra*. Therefore, though the issue is a different one from the one before Judge Bicks, in considering whether we may entertain the purported appeal we must hold that inasmuch as Judge Dimock exercised power properly exercisable only by a three-judge district court we have no jurisdiction to hear an appeal from his order. This result is required under the *Stratton* doctrine.

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[5] See *Board of Supervisors* v. *Turead*, 207 F. 2d 807 (5 Cir. 1953), judgment vacated on other grounds and cause remanded, 347 U. S. 971 (1954).

[fol. 69] The refusal by Judge Dimock to request that a three-judge district court be convened is, of course, subject to the same infirmity that Judge Bicks' refusal was. This order was but a reaffirmation of the earlier decision.

Also, the stay pending appeal granted by Judge Dimock is not an appealable order. It enjoined state activities allegedly repugnant to the federal constitution, and such an injunction was properly issuable only by a three-judge district court.

The results we reach are unhappy ones. We are refusing access to our court to a party who we believe is entitled to relief. However, as we understand *Stratton*, the Supreme Court has determined that we are not the proper tribunal to adjudicate the issues raised by the purported appeals.

Appeals dismissed.

LUMBARD, *Chief Judge* (dissenting):

Agreeing with my brethren that the orders made by Judges Bicks and Dimock are of the sort which are ordinarily appealable,[1] I would deny the motion to dismiss and would hear the appeals to decide first whether the single district judges had jurisdiction to act as they did and then proceed, if it is found that they did have jurisdiction, to consider the merits.

The appellees argue here, and my brethren agree with them, that even if these orders are appealable in form, no review of the merits may be made by this court. Since an injunction restraining the enforcement of a state statute on the ground that it violates the federal Constitution may be issued only by a three-judge court, 28 U. S. C. §2281, the [fol. 70] appellees contend that the single district judge had no jurisdiction to entertain the application, and that this lack of jurisdiction may be attacked only by way of mandamus in the Supreme Court. The appellees, who thus find

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[1] See, in addition to the *Glen Oaks Utilities* case cited in the majority opinion, *NAACP* v. *Bennett*, 360 U. S. 471 (1959), where, on appeal from an order of a three-judge court retaining jurisdiction, the Supreme Court considered the merits without discussing the issue of appealability.

themselves in the odd posture of urging upon this court lack of jurisdiction in the district court in order to preserve for their benefit the very order which they claim was entered without jurisdiction, cite dictum in *Stratton* v. *St. Louis S. W. Ry.*, 282 U.S. 10 (1930), in support of their position.[2]

It is clear beyond any doubt that if a district judge, without entering an appealable order, rules that he, sitting alone, will hear a request for an injunction restraining the enforcement of a state statute, the appropriate remedy for a party requesting a three-judge court is by writ of mandamus in the Supreme Court. E.g., *Ex parte Bransford*, 310 U. S. 354 (1940); see Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, 360 (1951 ed.) and authorities there cited. A court of appeals would not then have appellate jurisdiction under 28 U. S. C. §§1291, 1292. Nor would it be proper for a court of appeals [fol. 71] itself to enter a writ of mandamus since the courts of appeal have no appellate jurisdiction over cases decided by three-judge district courts and could not, therefore, satisfy the requirement of 28 U. S. C. §1651 that such writs

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[2] "If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction no appeal lies from such an order or decree to this Court, as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement. Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this Court.

"Accordingly, where a court of three judges should have been convened, and was not, this Court may issue a writ of mandamus to vacate the order or decree entered by the District Judge and directing him, or such other judge as may entertain the proceeding, to call to his aid two other judges for the hearing and determination of the application for an interlocutory injunction." 282 U. S. 15-16.

may issue only "in aid of their * * * jurisdictions." See *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 25 (1943).

In this case, however, the district court has proceeded to enter orders which meet the standards for appellate review prescribed by 28 U. S. C. §§1291, 1292. The appellees urge that nonetheless this court should dismiss the appeals for lack of jurisdiction and leave the appellant with its remedy of mandamus in the Supreme Court. If, in fact, the district judges exceeded their jurisdiction in entering the orders before us on appeal, we would surely be barred from considering the merits underlying their decisions. 28 U. S. C. §1253 directs that in "any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges" an appeal may be taken from a denial of an interlocutory or permanent injunction directly to the Supreme Court. But I think we have the jurisdiction and the statutory obligation to hear this appeal and first decide whether the orders did exceed the jurisdiction of district judges sitting alone in the district court, and whether the suit was of the kind which should have been presented to a district court of three judges. *Diggs* v. *Pennsylvania Public Utilities Comm'n*, 180 F. 2d 623, 629 (3d Cir. 1950).

If we hold that Judge Bicks was required to impanel a three-judge court, we must vacate his order and that of Judge Dimock for lack of jurisdiction, and we can go no further. *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 206 F. 2d 427, 433 (3d Cir. 1959); *Board of Supervisors* v. *Tureaud*, 207 F. 2d 807 (5th Cir. 1953). But see [fol. 72] *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317 (6th Cir. 1958); *Waddell* v. *Chicago Land Clearance Comm'n*, 206 F. 2d 748 (7th Cir. 1953). If, on the other hand, we hold that the issues before the district judges were not for a three-judge court either because the challenge to the state statute was not of the type comprehended by 28 U. S. C. §2281 or because the question of "equitable abstention" is analogous to the threshold jurisdictional determination of a substantial federal question, which is to be decided by the single district judge and reviewed by the court of appeals, *Bell* v. *Waterfront Comm'n*,

279 F. 2d 853 (2d Cir. 1960), we should proceed to the merits as we would in any other case in which the jurisdiction of a district judge is attacked and is upheld. Cf. *Query* v. *United States*, 121 F. 2d 631 (4th Cir. 1941), *vacated on other grounds*, 316 U. S. 486 (1942); *Capital Service, Inc.* v. *United States District Court*, 198 F. 2d 18 (9th Cir. 1952).

Jurisdictional questions are surely not beyond the scope of this court's authority. We are often called upon to decide whether diversity jurisdiction was properly exercised by a district court, although in deciding that it was not we must vacate the decision below and oust ourselves of jurisdiction to go any further. Underlying the majority's opinion is the assumption that matters which should be considered only by a three-judge court and by the Supreme Court should not be presented to this court—that supervision over three-judge panels should rest with the Supreme Court only. But even when the issue is whether a case was one as to which original jurisdiction lay exclusively with the Supreme Court, courts of appeal have passed on the jurisdictional issue after a final order was entered and have not required the parties to seek relief by way of mandamus in the Supreme Court. See *United States* v. *State of* [fol. 73] *Washington*, 233 F. 2d 811 (9th Cir. 1956); *Farnsworth* v. *Sanford*, 115 F. 2d 375 (5th Cir. 1940), *cert. denied*, 313 U. S. 586 (1941).

If we were now to decide the jurisdictional question the Supreme Court could, of course, review our determination on certiorari or even by a writ of mandamus. The majority's view, however, imposes on the federal courts a procedure of piecemeal review whereby a court of appeals is always forced to stay its hand whenever an appellant or appellee argues to it that the decision below should have been made by a three-judge court. No matter how worthless such a claim may be, we would not be able to dispose of it on an appeal from a final order but would have to await a decision on a petition for mandamus in the Supreme Court. Only after the Supreme Court decided the jurisdictional question might we be permitted to consider the merits, and the merits would not be ripe for Supreme Court

review until we had passed upon them on remand. I cannot believe that the authority of the Supreme Court over three-judge tribunals was intended to extend so far as to preclude us from deciding the jurisdictional issue when a district judge enters an order that is otherwise appealable under 28 U. S. C. §§1291, 1292, and thereby to impose on the parties a procedure calling for separate appellate consideration of the jurisdictional and substantive questions.

It is true that the dictum in the *Stratton* case, *supra,* appears to indicate that even after an appealable order is entered by the district court, the only means of vacating it is by mandamus in the Supreme Court. But it seems to me that the Supreme Court in *Stratton* was concerned with the effects of appellate review of the *merits* of an unauthorized order entered by a single district judge and did not proscribe ordinary review of matters going to the *jurisdiction* [fol. 74] of the single district judge if his order is otherwise appealable. See Hart & Wechsler, The Federal Courts and the Federal System 853 (1953).

For these reasons I would deny the motion to dismiss.

A true copy,

A. Daniel Fusaro, Clerk.

[fol. 75] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. J. Warren Madden, Judge, Court of Claims, Hon. Sterry R. Waterman, C.J.

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Plaintiff-Appellant,

v.

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York, Defendants-Appellees.

JUDGMENT—April 14, 1961

Motions having been made herein by counsel for the appellees to dismiss the appeals of November 4, 1960 and December 28, 1960, for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said motions be and they hereby are granted and that the appeals from orders of the United States District Court for the Southern District of New York be and they hereby are dismissed.

A. Daniel Fusaro, Clerk.

[fol. 75a] [File endorsement omitted]

[fol. 76]

SUPREME COURT OF THE UNITED STATES

Nos. 138 and 180, Misc.—October Term, 1961

138

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Petitioner,

v.

MARTIN C. EPSTEIN, et al.

On Petition for Writ of Mandamus

180, Misc.

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Petitioner,

v.

HONORABLE ALEXANDER BICKS, et al., Judges of the United States District Court for the Southern District of New York.

PER CURIAM OPINION—June 25, 1962

The petitioner is in the business of selling bottled wines and liquors for export from the United States and delivery to international airline passengers at their overseas destinations. Upon advice of the Attorney General of New York, the State Liquor Authority informed the petitioner that its business was illegal under the provisions of the New York Alcoholic Beverage Control Law. The petitioner then instituted an action in the United States District Court for the Southern District of New York against the respondents, members of the State Liquor Authority. The complaint asked for a judgment declaring that the

state statutes, as applied, were repugnant to the Commerce Clause, the Export-Import Clause, and the Supremacy Clause of the United States Constitution, and for an injunction restraining the State Liquor Authority from interfering with the petitioner's business.

A request for a three-judge court under 28 U. S. C. §§ 2281, 2284, was denied. Instead, the district judge to [fol. 77] whom the request was presented simply retained jurisdiction of the cause, in order to give the state courts an opportunity to pass upon the constitutional issues presented, although there was no relevant litigation then pending in the state courts. 188 F. Supp. 434.

The petitioner appealed to the Court of Appeals for the Second Circuit.[1] That court dismissed the appeal, one judge dissenting. 289 F. 2d 426., Unambiguously stating its opinion that the District Court had acted erroneously, and that "a three-judge district court should have been convened," the Court of Appeals was nevertheless of the view that it was powerless to take formal corrective action in light of this Court's decision in *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10.[2]

Thereafter the petitioner once again filed a motion in the District Court requesting that a statutory three-judge court be impaneled. The request was again refused upon the ground that the previous ruling made by other judges of the District Court had established "the law of this case," and that the Court of Appeals' opinion that a three-judge court should be appointed was merely a "dictum." 194 F. Supp. 3. We granted certiorari and a motion for leave to file a petition for a writ of mandamus. 368 U. S. 812.

We agree with the Court of Appeals that a three-judge court should have been convened in this case. When an

[1] During the pendency of the appeal another judge of the District Court for the Southern District of New York issued a temporary injunction restraining the respondents from harassing the petitioner's business, but, relying on the original judge's order, refused a renewed request for a three-judge court.

[2] The Court of Appeals properly rejected the argument that the order of the District Court "was not final and hence unappealable under 28 U.S.C. §§ 1291, 1292," pointing out that "[a]ppellant was effectively out of court." 289 F. 2d, at 428.

application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately [fol. 78] limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute. Those criteria were assuredly met here, and the applicable jurisdictional statute therefore made it impermissible for a single judge to decide the merits of the case, either by granting or by withholding relief.[1]

In the *Stratton* case it was held that a court of appeals was precluded from reviewing on the merits a case which should have originally been determined by a court of three judges. *Stratton* does not stand for the broad proposition that a court of appeals is powerless ever to give any guidance when a single judge has erroneously invaded the province of a three-judge court. The Court of Appeals clearly stated its opinion that a court of three judges ought to have been convened to consider this litigation. That view was correct and should have been followed upon the petitioner's renewed motion that such a statutory court be impaneled.

We deem it unnecessary to take formal action on the petition for a writ of mandamus. The case will be remanded to the District Court for expeditious action consistent with the views here expressed. Cf. *Bailey* v. *Patterson*, 369 U. S. 31, 34. *It is so ordered.*

MR. JUSTICE FRANKFURTER took no part in the decision of these cases.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE took no part in the consideration or decision of these cases.

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[1] This is not a case like *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317, where a three-judge court was requested only in the event that it should first be held that the state statute was by its terms applicable to the plaintiff's business operations.

[fol. 79]

SUPREME COURT OF THE UNITED STATES

No. 138, October Term, 1961

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Petitioner,

vs.

MARTIN C. EPSTEIN, et al.

JUDGMENT—June 25, 1962

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the United States Court of Appeals for the Second Circuit, and was argued by counsel.

On Consideration Whereof, It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Southern District of New York for proceedings in conformity with the opinion of this Court.

It is further ordered that the said petitioner, Idlewild Bon Voyage Liquor Corporation, recover from Martin C. Epstein, et al. Two Hundred and Seven Dollars and Seventeen Cents ($207.17) for their costs herein expended.

June 25, 1962

Clerk's costs	$176.68
Printing part of record	30.49
Total	$207.17

A true copy Test: John F. Davis, Clerk of the Supreme Court of the United States.

[fol. 80] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
60 Civil 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Plaintiff,

—against—

MARTIN C. EPSTEIN, WILLIAM H. MORGAN, ROBERT E. DOYLE, JOHN C. HART and BENJAMIN H. BALCOM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York, Defendants.

ANSWER—Filed August 10, 1962

The defendants answer the complaint as follows:

First Defense

This Court lacks jurisdiction over the subject matter of this action.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

Third Defense

This Court should abstain from adjudicating any issue respecting the state statutes challenged by the complaint until their construction and interpretation, as applied to plaintiff's operations, have been determined by the state courts.

Fourth Defense

I. Defendants deny the allegations contained in paragraphs "1", "11", "12", "13", "14" and "15" of the complaint.

II. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of [fol. 81] the allegations of paragraphs "5", "9" and "10" of the complaint.

III. Defendants admit that plaintiff's operations are conducted in the Arrivals Building at New York International Airport at Idlewild in the City and State of New York, and that orders for the purchase of wines and liquors are received by plaintiff, and paid at plaintiff's office at Idlewild, but allege that they are without knowledge or information sufficient to form a belief as to the truth of any other allegation of paragraph "4" of the complaint.

IV. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph "6" of the complaint, except that they admit that a copy of 19 U. S. C. § 1311, and a copy of a letter from D. B. Strubinger to Robert W. Dill is annexed to the complaint as Exhibit "A".

V. Defendants deny the allegations of paragraphs "7" and "8" of the complaint, except that they admit that they advised plaintiff as set forth in Exhibit "C" annexed to the complaint acting pursuant to an opinion of the Attorney General of the State of New York which is set forth in Exhibit "B" annexed to the complaint, and that Exhibits "D" and "E" are also annexed to the complaint.

VI. Defendants admit that Martin C. Epstein and William H. Morgan are Members and Commissioners of the State Liquor Authority of the State of New York. Since commencement of this action, Martin C. Epstein has become Chairman of the New York State Liquor Authority, and Robert E. Doyle, John C. Hart and Benjamin H. Balcom have been appointed as Members and Commissioners of the State Liquor Authority, in place of Thomas E. Rohan, Grant F. Daniels and Samuel M. Birnbaum.

[fol. 82] Wherefore, defendants demand judgment that the complaint herein be dismissed and that they have their costs and disbursements of this action.

Louis J. Lefkowitz, Attorney General of the State of New York, Attorney for Defendants, By Irving Galt, Assistant Solicitor General, Office & P. O. Address, 80 Centre Street, New York 13, New York, Cortlandt 7-9800.

[fol. 83] Proof of Service (omitted in printing).

[fol. 84]

NOTICE OF PROPOSED ORDER FOR SETTLEMENT—Filed August 28, 1962 (omitted in printing)

[fol. 85]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civil 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Plaintiff,

—against—

MARTIN C. EPSTEIN, et al., Defendants.

ORDER CONVENING COURT—August 23, 1962

It appearing that, by order dated July 26, 1962, District Judge Bonsal ordered that this matter be determined by three judges in accordance with the provisions of 28 U.S.C. Section 2284, and

It further appearing that by order filed August 6, 1962, Chief Judge Lumbard of this Circuit ordered that this court consist of the Honorable Paul R. Hays, United States Circuit Judge, and the Honorable Archie O. Dawson and the Honorable Dudley B. Bonsal, United States District Judges, it is hereby

Ordered that hearing of this matter before the aforesaid three-judge district court be held at 10 o'clock on October 4, 1962, in Room 519, United States Court House, Foley Square, New York, New York, and it is hereby further

Ordered that the defendants' time to file an answer is extended to August 13, 1962, and it is hereby further

Ordered that briefs of plaintiff shall be served on or before the 14th day of September, 1962, and answering [fol. 86] briefs of the defendants shall be served on or

before the 25th day of September, 1962, with leave on the part of the plaintiff to reply thereto on or before the 1st day of October, 1962.

Dated: August 23, 1962.

Dudley B. Bonsal, United States District Judge.

[fol. 87] Acknowledgment of service (omitted in printing).

[fol. 88]

BEFORE THE STATUTORY COURT

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civ 2902

IDLEWILD BON-VOYAGE LIQUOR CORP., Plaintiff,

vs

MARTIN C. EPSTEIN, WILLIAM H. MORGAN, ROBERT E. DOYLE, JOHN C. HART and BENJAMIN H. BALSON, being the Chairman, members and commissioners of the State Liquor Authority of the State of New York, Defendants.

Transcript of Hearing—October 5, 1962

New York, N. Y.

Before Hon. Paul R. Hays, C. J., Hon. Archie O. Dawson, D. J., and Hon. Dudley B. Bonsal, D. J.

APPEARANCES

Kelly & Schwartz, Esqs., Attorneys for Plaintiff, Charles H. Tuttle, Esq., and John F. Kelly, Esq., of Counsel.

Hon. Louis J. Lefkowitz, Esq., Attorney General of the State of New York, Irving Galt, Esq., Assistant Solicitor General, and George Zuckerman, Esq., of Counsel.

[fol. 90]

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Hays: Are both sides ready?

Mr. Tuttle: Plaintiff is ready.

Mr. Galt: Defendants are ready.

Your Honors, may I make a brief explanatory statement, so it will be clear as to the course which counsel have been following in anticipation of this hearing?

Judge Hays: Very well, Mr. Galt.

Mr. Galt: There is in the answer, as your Honors will note, an affirmative defense of equitable abstention, the State courts first to pass upon the merits of this controversy, and there was also some question as to whether this hearing was merely limited to the question of preliminary injunction.

In conversations which I have already had with two of the Justices, in order to attempt to clarify the situation, and with Mr. Tuttle, we understand—and I believe the Court so understands—that this is to be a full hearing on the merits of the case for permanent injunction and declaratory judgment, as requested by plaintiff, that the State will not press its defense of equitable abstention, but in its anxiety to have the matter disposed of at the earliest possible moment, will proceed for full submission to this Court.

[fol. 91] We feel that the operations of this plaintiff have gone on unchecked for two and a half years, and we would like, if possible, to submit this for the earliest possible disposition of the case on the merits.

I believe that is our understand,* Mr. Tuttle, and if it in any* differs from your understanding, would you let me know?

Mr. Tuttle: I understand you. We are all prepared to submit this as a final matter.

My brief, which was prepared at the time, right after the decision of the Supreme Court of the United States, was in revival of the motions that I had pending at the time we went into the Supreme Court. I had two motions pending, one for the convening of the three-Judge court,

* So in copy.

which by reason of the circumstances stated in the opinion of the Supreme Court I had not been able to achieve; and the second was for a temporary injunction, and again the opinion of the Supreme Court shows the reasons by which, by virtue of judicial decisions below, I was not able to achieve that.

So when the Supreme Court came down with its decision, holding squarely that our complaint stated circumstances which, to use their adverb, assuredly entitled us to a three-Judge court, I revived those pending motions.

[fol. 92] After that, by virtue of some conversations with Mr. Galt, I took his assurance that it would not be necessary for me to press my revived motion for a temporary injunction, in other words, that no adverse action would be taken, directly or indirectly, by the defendants, the Liquor Authority.

Under the circumstances, I have not pressed that motion to an order, because I have accepted his assurance. That leaves, therefore, the motion for a three-Judge court, which was, of course, granted by the District Judge to whom my revived motions were presented, and, in consequence, that left us as a practical matter with the trial, our presentation of the case for final disposition.

I think that is substantially in accord with what Mr. Galt has said. He has presented in his answer, which was made several months after the decision of the Supreme Court, four defenses. They are not affirmative defenses in the kind of new matter.

The first defense is that no claim for relief is stated. Of course, that would be inconsistent with the decision of the Supreme Court. The second is there is no jurisdiction; and that, of course, would be inconsistent with the decision [fol. 93] of the Supreme Court.

The third was an effort by the answer to revive the claim which Judge Bicks had entertained in the first place but which was reversed by the Supreme Court of the United States, to wit, that there should be abstention by the Federal Court to await determination by the State Court. I understand that although that is in the answer, Mr. Galt is not now pressing it.

So what we are left with is the so-called fourth defense; which, as your Honors will see, consists only of denials and not of any allegations of new matter.

I think that covers the preliminary situation.

* * * * * * *

[fol. 95] Mr. Galt: Just briefly, I want to make it crystal clear for the record that the only defense to which I made reference was that labeled the third defense. We are not abandoning one whit any other element of our pleading.

I also wish to make it clear to the Court that under the circumstances that this case now comes before it, after remand from the United States Supreme Court—and the procedure very quickly puts a case of this kind before a three-Judge court—we had no alternative but to seek our deposition after the filing of our answer, and of course this means that we had no affirmative matter in the sense that Mr. Tuttle suggested included in it.

Opening Statement on Behalf of Plaintiff

Mr. Tuttle: I have no implied criticism at all.

I will proceed, then, with the permission of the Court, to make an opening statement, because this litigation has had a very considerable history, some of which has been quite disconcerting.

When by virtue of an opinion of the Attorney General of the State of New York, which the Liquor Authority proposed to enforce, and which I will call attention to in a moment, we instituted this litigation by a verified com-[fol. 96] plaint—I trust that your Honors all have a copy of the transcript of the record for convenience in order that you may examine the complaint, and you will find attached to it, at page 21-A, a communication of the Treasury Department of the United States under which, as we will see in a moment, the answer concedes we have been doing our operations down to the present time.

Your Honors will also find at page 25-A an opinion of the Attorney General of the State of New York, which I propose to discuss in a moment, and, at 26-A I think it is, a letter from the Liquor Authority to us, declaring that our operations are illegal.

Now, with that as a start, we brought an action to restrain the enforcement of that opinion of the State Attorney General, and we applied at the same time in the complaint for a three-Judge court. We based our case on those familiar clauses of the Constitution giving Congress the exclusive power to regular* foreign commerce and import and export, and we cited the two Supremacy clauses in the Constitution.

We came before Judge Bicks, and he held, after mature deliberation, that the case should be referred to the State Court, or—put it this way—that the Federal Court should [fol. 97] abstain until there had been determination by the State Court, and inasmuch as no action was then pending in the State Court, as the Supreme Court points out—it states in its opinion there was no relevant action pending—it means we were out, as the Supreme Court says, of the Federal Court and were referred to a State Court without any action pending. In other words, we would have had to go there and start an action.

We did not accept that point of view. We appealed to the Court of Appeals of this Circuit, and we made an application before Judge Dimock for a renewing of our application for a restraining order—of course, these are all public records that I am referring to—on the ground that, as shown by our affidavits, the Liquor Authority was proceeding to get in touch with our distillers from whom we bought and with the bonded truckers which brought our liquor to us, and in effect indicated to them that if they further supplied us they would be jeopardizing their licenses from the Liquor Authority.

Also, the opinion of the Attorney General, as you will see in the complaint, was given great publicity by the Association of Liquor Distillers after it was made known by the Liquor Board, and all distillers were warned against [fol. 98] supplying us.

So we applied to Judge Dimock, when that developed, after the decision of Judge Bicks, and asked for an injunction. He held two things: one, that he felt himself bound by the decision of Judge Bicks, but that we were clearly entitled, in his judgment, to a restraining order pending appeal to the United States Court of Appeals.

Consequently, we had a lease of life. We argued the matter in due course in the Court of Appeals, and they rendered a decision, saying that in the opinion Judge Bicks was wrong, that we should have been granted a three-Judge court, and that, however, in view of their interpretation of a certain decision by the Supreme Court in the Stratton case, they had in their view no jurisdiction of the appeal, and therefore they could do nothing for us except dismiss the appeal, and at the end they expressed their regret at leaving us naked, as it were, because they said we were entitled to relief, in their judgment.

Well, that again left us in a situation where we had to rush around and see if we could get a restraining order. So we applied to Mr. Justice Harlan for a restraining order pending our presentation to the Supreme Court of two [fol. 99] things: one, a petition for certiorari and the other, an application for leave to file a motion for mandamus.

The Supreme Court in due course granted both without distinguishing between the two. So we were before the Supreme Court, and in due course they rendered a unanimous decision clearing all this brush away, which you will find in 370 U. S. at page 713. The decision was to the effect that we had properly invoked the Federal jurisdiction under the circumstances; second, that we were clearly entitled, or, to use their adverb, assuredly entitled to the convening of a three-Judge court; that the Court of Appeals had misconceived its function because it had a certain supervisory and directory power even if it did not have a direct appeal power under the circumstances, and that, in consequence, the third decision, made by the third District Judge to whom we applied, was also erroneous. I should mention that.

After the decision of the Court of Appeals saying that we were clearly entitled to relief but they couldn't give it to us, we rushed in before Judge Dimock and asked him —I mention this because it is all in the opinion of the Supreme Court—to follow the expression of the Court of Appeals and to grant us a three-Judge court, and in the [fol. 100] meanwhile, in view of the fact that our supplies were all cut off, to give us a temporary injunction to keep us alive.

Judge Dimock in his opinion, which is part of the other—the other two opinions and Judge Bicks' are reported; Judge Dimock's is not; it is in the record, however—said that what the Court of Appeals had said about our being entitled to relief and a three-Judge court struck him merely as dictum, that all they had really decided was to throw us out of the Court of Appeals, dismiss the appeal, and that he, too, like Judge Dimock, was bound to follow the law as laid down by Judge Bicks.

So that, as I say, we finally came to the point where—

Judge Bonsal: Wasn't that Judge Cashin, the last Judge?

Mr. Tuttle: Did I say—

Judge Bonsal: You said "Judge Dimock". It was Judge Cashin.

Mr. Tuttle: Yes, your Honor. He was the third District Judge.

We finally came to the point where, under that aegis of the decision of the Supreme Court, we were able to [fol. 101] renew our motion, and then we are here under the circumstances which have already been stated.

Now, I would like to make what I would like to say will be a brief and factual statement.

Judge Dawson: Can we get any statement as to what the facts are?

Mr. Tuttle: No, your Honor. I will have to explain that the answer undertakes to deny quite a large portion of the complaint for lack of—

Judge Dawson: I am wondering, now that we are here, reading this opinion of the Attorney General: It states certain facts, and I wonder if we could agree that those facts exist without dispute. If there is a dispute, then we know what the issue of fact is that we have to decide.

Mr. Tuttle: Well, your Honor, I think I can answer that because of my talks with Mr. Galt, which are that he does not regard those statements by the Attorney General as evidentiary in this situation.

Judge Dawson: I don't, either, but I wonder if there is any dispute. I wonder, if there is a dispute, what the dispute is.

Could we just take that paragraph and go one fact after another? You might want to take testimony.

[fol. 102] Mr. Tuttle: I am perfectly happy to do that, and that is what I was going to press for.

Judge Dawson: Why don't we just read what it says here and see if there is any dispute on any of these facts? If so, we have to take testimony. If there is no dispute, it becomes a question of law.

Mr. Tuttle: Your Honor, I have some legal considerations, but so far as the factual side of the situation is concerned, it would be perfectly willing to do that, because—may I say this in connection with the answer—because I think it fortifies the observation which your Honor has made. There are certain admissions in the answer. The first of these—outside of the admission, of course, that we are a corporation—is, and I will read it from the answer:

"Defendants admit that plaintiff's operations are"—That brings us right down to the present moment, which is, I think, two and a half or two years at least since that opinion of the Attorney General was rendered—"are conducted in the Arrivals Building at New York International Building, Idlewild, in the City and State of New York, and that orders for the purchases of wines and liquors are received by the plaintiff and paid at plaintiff's office at Idle-
[fol. 103] wild."

Then they say that they are without knowledge or belief to form any of the other allegations in that paragraph.

The next admission that they admit is that a copy of a letter from D. B. Strubinger to Robert W. Dill is annexed to the complaint as Exhibit A. That is what we regard as our license or sanction from the Federal Government. You will find that, if my memory serves—what is that—19 or 21-A—19-A of the complaint.

Your Honor, in looking at that letter, will see that it does not bear any date. That was due to an error in printing the record. The date was inadvertently left out. But all the way to the Supreme Court of the United States we have referred to it by the date, which is actually theirs. It is April 15, 1958.

So they admit that as a copy of a letter from D. B. Strubinger to Robert W. Dill.

Now, the titles of those two officials are indicated in the letter itself.

Then they admit that they advised the plaintiff, as set forth in Exhibit C annexed to the complaint, acting pursuant to an opinion of the Attorney General of the State [fol. 104] of New York, which is set forth in Exhibit B annexed to the complaint.

So that we have that much additional in the record as a foundation for determining what is admitted.

I would like, however, with the permission of the Court, to undertake to explain some legal viewpoints which I must use in advance in connection with the further development—

Judge Dawson: I would like first to know what the facts are.

Mr. Tuttle: Well, I remember once sitting in court when a young and enthusiastic lawyer was before dear old Judge Goddard, pressing the law at him as hard as he could, and the judge kept saying, "Now, very interesting, but what are the facts?" And finally he threw up his hands and said, "Your Honor, please, let me argue this on the law."

Naturally, that was not highly approved by the bench.

I am willing to proceed with that approach at this, but I would have to say that some of the things my friend is going to say on the other side I anticipate from the conversations I have had with him are matters which I think I am entitled under the law to have excluded, and conse- [fol. 105] quently that will take with it, if I am right about that, a large, very large body of fact, and consequently we might be discussing a body of fact from an implied viewpoint by feeling that a collateral attack, such as is made in the opinion of the Attorney General on the actions of the Treasury Department of the United States cannot be entertained in this case.

Judge Dawson: What do you say the facts are, Mr. Tuttle? Then we will find out what Mr. Galt says, and we will see what the difference is.

Mr. Tuttle: Well, what I say are the facts are exactly what is stated in two documents, both of which are admitted in the answer. One is the letter from the Treasury Department under which we are operating; second, the statement made by the Attorney General in his opinion on the strength of information furnished to him, which

evidently was factual information, by the Liquor Authority in two letters which preceded that.

Now, then, your Honors, I am saying that those statements there are factual statements. The Liquor Authority, as your Honors know, possesses certain police powers, powers of investigation, and it is plain that in two letters—and I am going to ask for those letters if it becomes necessary; I am not for the moment, but I have already asked [fol. 106] Mr. Galt to produce them, so that I can see the full extent to which they have made factual representations to the Attorney General.

Of course, I have not seen them. Mr. Galt said—I think very properly—that he would have to consult with the Attorney General and also with the Liquor Authority as to whether or not these fell under a privilege.

Now, I am going to claim—and I think I have a decision of the Court of Appeals of this Circuit—that they do not fall under any privilege, but setting that aside and taking the recitation of facts, I believe that those are an absolutely sufficient statement of facts for our case and for the legal points that I am very anxious—

Judge Dawson: Now, what are those facts? Can you enumerate those facts?

Judge Hays: You said those facts are admitted, Mr. Tuttle. You don't plan to call any witnesses?

Mr. Tuttle: I am trying to answer Judge Dawson's question. He said, can we assume or can we agree at least to the extent that the facts are stated, and I am saying yes.

Judge Dawson: All right.

[fol. 107] Mr. Tuttle: As far as I am concerned, then are a compendium—a compendium of the facts, and under the admission in the answer that we are operating now—that means an operation of over two years, at least, that we have been going on, continuing our business according to those facts, and we are pointing to the fact that he, the Attorney General, does not deny those facts in the letter, but, on the contrary, he asserts them as his predicate.

Now, when you read the opinion of the Attorney General, you will see he has but one legal point, and he founds himself on that one point, to wit, that the liquor law of the State of New York makes it illegal to sell liquor without

a license, and then, the opinion goes on to say that there is nothing in the liquor law which would authorize the issue of a license for our operations; therefore, we are doing something which is both unlicensed and unlicensable under the State law; and then, from those two predicates, premises in his syllogism, he deduces the conclusion that whereas the Federal Government has licensed us to do these very things, the State of New York can interpose itself and veto it all and kill us.

There is nothing in the opinion of the Attorney General [fol. 108] which finds fault with anything we are doing.

Judge Dawson: Well, what are you doing, Mr. Tuttle? I am still trying to find out what the facts are, to see if there is any dispute as to the facts. It is no good to argue what the law is. I have read all of this, and I have a pretty good idea of what the issues are, but what is the issue of fact in any of this? If there isn't any issue of fact, then let us argue the law.

Mr. Tuttle: I am perfectly willing to expand a narrative of our operations, if the narrative given by the Attorney General is not sufficient.

Judge Dawson: Let me ask you:

I want to take the facts as set forth in the opinion, and then we will ask Mr. Galt if there is any dispute as to those facts, and if there is no dispute as to the facts, then we can certainly have a very interesting argument on the law.

If there is a dispute on the facts, we ought to settle that dispute first.

Mr. Tuttle: Well, I am perfectly willing to follow that, your Honor. All I want to say is that I do not want to be misinterpreted as regarding certain claims that Mr. Galt makes, whether they are factual or legal, as con- [fol. 109] trolling or pertinent in this case, nor do I wish to assume that the recitations in the Attorney General's opinion that are factual, coming as they do from the Liquor Authority itself, as factual discoveries by them, descriptive of what we are doing, are to be put aside as if they were not pertinent testimony in themselves for the plaintiff's case.

Judge Dawson: But I do not see what you are so worried about, Mr. Tuttle.

Mr. Tuttle: I am not worried about a thing, your Honor.

Judge Dawson: What are you trying to avoid?

Mr. Tuttle: I never came into Court with more confidence.

Judge Dawson: Well, why not get down to what the facts are?

Mr. Tuttle: I happen to be backed by the Supreme Court of the United States, and that is apt to give a lawyer confidence.

Judge Dawson: Can you concede this: that the plaintiff is a New York corporation?

Mr. Tuttle: I not only concede it but assert it, your Honor.

Judge Dawson: All right. It is a lessee under lease [fol. 110] from the New York Port Authority—

Mr. Tuttle: I not only concede it but assert it.

Judge Dawson: —of space sixteen feet wide and thirty feet, four inches in depth—

Mr. Tuttle: I not only concede it but assert it.

Judge Dawson: —on the second floor of the new Arrivals Building at New York International Airport, Idlewild—

Mr. Tuttle: I not only concede it but assert it.

Judge Dawson: —and that the lessee uses the front portion of the space as an office where orders for liquor are taken for passengers departing from the United States by plane. Is that conceded?

Mr. Tuttle: I not only concede it but assert it.

Judge Dawson: —that a portion of the leased space is used for the storage of liquor that remains under bond and under the supervision of the Bureau of Customs at all times until delivery to the airplane?

Mr. Tuttle: I not only concede it but assert it.

[fol. 111] Judge Dawson: All right. —that this liquor is purchased by the plaintiff from suppliers from stock held by the suppliers in bond.

Mr. Tuttle: I was trying to follow—

Judge Hays: The end of the parentheses, there.

Mr. Tuttle: Your Honor, I believe, dropped out a sentence. The liquor is to be shipped by the lessee. That is a very important—

Judge Dawson: Start at the portion, "The leased space will be used for the storage of liquor." —that the liquor is purchased by the plaintiff from suppliers from stock held by the suppliers in bond?

Mr. Tuttle: Yes. I not only concede it but assert it.

Judge Dawson: Now, the liquor is shipped by the plaintiff from the United States on the plane on which the passenger departs but is not delivered to the passenger until he reaches his foreign destination.

Mr. Tuttle: I not only concede it but assert it.

Judge Dawson: The shipment is on documents approved by the Federal Government.

Mr. Tuttle: I not only concede it but assert it.

[fol. 112] Judge Dawson: Mr. Galt, is there any dispute as to those facts?

Mr. Galt: If your Honors please, I think there should be—

Judge Dawson: No. Is there any dispute?

Mr. Galt: What is the dispute?

Mr. Galt: It is not easy to state as to each one, but we strenuously dispute that there is supervision of the Bureau of Customs. I think I may put it better for the Court and for the purposes of the Court when I say that I do not think, from what we have been able to ascertain thus far, that the plaintiff will be able to support the allegations in its complaint. Many of the material allegations of fact—

Judge Dawson: I just want to find out what you are disputing. I don't want a speech. I want to know what you are disputing. Do you dispute that this liquor is under the supervision of the Bureau of Customs until delivery to an airplane?

Mr. Galt: In any reasonable sense of that term, yes, I do.

Judge Dawson: What other of those facts do you dispute?

[fol. 113] Mr. Galt: These are not a complete documentation of the facts. These are the facts which we received and acted on.

Judge Dawson: Let us confine ourselves for the minute to these facts. Do you dispute any of these facts?

Mr. Galt: We are limiting ourselves to the Attorney General's opinion here. Yes. I will dispute the fact that they act only from the leased space. After we filed our answer here and had our further negotiations, we find that they do not operate just from the leased space, and I don't think the plaintiff will dispute that. We got the information from them.

Mr. Tuttle: One moment. I am not going to sit here quietly—

Judge Dawson: Wait a minute, Mr. Tuttle. I am trying to find out from Mr. Galt here—

Mr. Tuttle: —to get those statements into the record, because they do not comport with my understanding.

Mr. Galt: I don't believe that the plaintiff, by any stretch of the imagination will be able to show that they operate as set forth under Exhibit A—

Judge Dawson: What facts do you dispute? You are [fol. 114] making a speech. We are trying to find out what facts you dispute.

Mr. Galt: I will go over the material allegations, starting with Paragraph 4 of the complaint.

Judge Dawson: No. Of the facts that I just recited and which we were following when I was reciting them. If we can get a stipulation on those facts, that is one thing. If you can't stipulate, then we will have to take testimony.

Mr. Galt: We will go over those facts in Exhibit B.

We are doubtful whether in any sense of the term these liquors are under bond.

Judge Dawson: At what point? When they buy them or when they have them?

Mr. Galt: We don't believe they are sold under bond.

Judge Dawson: From the suppliers?

Mr. Galt: We do not know whether the liquor, under circumstances which will be demonstrated by this plaintiff, can be said factually to be delivered to anyone in Europe, for all the proof, all that appears from the proof that they will be able to give. I think the best they can do will be to show that it gets to the plane. And there are [fol. 115] possibilities, too, that it will not get to the plane.

We suggest that there is no Customs supervision in any acceptable sense of the term of the liquor leaving the plaintiff's premises and going to the plane.

Now, let me see if there are any other facts further on.

These are the only facts recited here in the Attorney General's opinion, but I want to make it clear to the Court, not to make a speech, but to let the Court know that in my opinion—and I say this seriously—this case has tremendous implications.

Judge Dawson: I realize that. I realize it does.

Mr. Galt: We feel that in order for the Court to properly appreciate the questions involved, we feel there must be a development of the facts. That is Number 1—

Judge Dawson: What are the facts—

Mr. Galt: We feel that Exhibit A, on which they rely—We don't dispute that it was April 15, 1961. We don't dispute that Mr. Strubinger signed it.

Judge Hays: 1958.

Mr. Tuttle: 1958.

[fol. 116] Mr. Galt: Excuse me, Mr. Tuttle. The date is one which you gave. It is not here, and I am trying to recall it. April 15, 1958.

Nor do we dispute Mr. Strubinger signed it; but we do not believe that the plaintiff operates as described in that letter, even for what it may be worth, and we do not say it is in any sense binding.

This is two years before the operation. The operation does not conform to what is in that letter.

Let us go through the complaint, and I will show your Honors where the essential and material allegations of fact are seriously in dispute and must be developed, in my opinion, in order that we can have the full context, the full setting in which the issues can be determined.

Mr. Tuttle: That, of course, is transferred to Mr. Galt—

Judge Dawson: No. I want to find out what is the issue of fact.

Mr. Tuttle: In his answer—

Judge Dawson: Mr. Galt now has the floor. Let him say what other facts he wants to allege.

Mr. Galt: All right. Now, if your Honors will permit me, if I may refer to the complaint, I think the most ma- [fol. 117] terial allegations are set forth in that long Paragraph 4, beginning on page 2-A.

Now, we do not agree that they are in-bond wines and liquors. I may miss a few material allegations that we dispute as I skip through the complaint in this fashion, but I will just indicate to your Honors some of them.

We do not believe that this is for export in any factual sense of the term. We do not believe that in the sense that it is set forth in the complaint that they have been approved by—that the premises have been approved by and are in the custody and under the supervision and control of the United States Bureau of Customs, either as regards their initial construction and security, for whatever they may matter, or certainly as regards the constant and continuing supervision and the accountability of plaintiff for all wines and liquors exported under Customs regulations. We say they are not exported under Customs regulations.

There may be mixed questions of law and fact here. I may call your Honors' attention to that fact.

We say that it is not at all times in the custody of the Bureau, not by any means, and you will notice the conjunctive "and"—under its supervision and control. We [fol. 118] say that it is not, in any acceptable, general, reasonable common sense under its supervision and control.

Now, we say that it is not withdrawn for export only from Class VI bonded warehouses. If need be, we will introduce proof to that effect if the plaintiffs will not concede it.

We say that they are not re-warehoused here in any sense of the term, factually or otherwise.

We say that this is not United States Customs controlled space within the meaning of any Federal law, any Federal code, any Federal regulation.

Skipping through, I say that each bottle does not have the legend which they say is on it. I will venture to say that at least sixty per cent and probably more of the bottles do not have that legend on it.

And I want your Honors to realize, too, that we have been somewhat handicapped here not being able to proceed against these plaintiffs, considering ourselves under injunction. Our investigation has necessarily been limited, but, limited as it has been, we feel that there are many loose things in this complaint and in these allegations. [fol. 119] Now, they are not stored—going over to page 4-A—exclusively in such bonded warehouses, and they do not remain at all times in the constant and continuous custody, control and supervision of the United States Treasury Department, Bureau of Customs, under regulations adopted pursuant to Section 311. Whose regulations they are I don't know, but they are not the regulations of the United States Code, of the Federal Code, of any rules and regulations which appertain to any such situation as this.

There are no elaborate and exhaustive precautionary measures. There is a mere paper supervision here and not a complete one at that, and I say this in no sense critical to the United States Customs Bureau, but I do say that the State of New York has a great interest to defend and maintain in this case, and we do not intend, if we can possibly help it, to have on some casual glossing over of the facts rights so serious as this determined.

I unfortunately cannot accept Mr. Tuttle's version of the facts.

We could go down the complaint all the way through, if your Honors wish, and so that— Let us come right here. They itemize A, B, C and D here on page 4-A, still in [fol. 120] the fourth paragraph. They say: "The elaborate and exhaustive precautionary measures"—which I think are very improperly so characterized—"providing continuous custody and supervision"—I don't think it exists in that sense—"by the United States Customs Bureau and its officials while in such bonded warehouses, during trans-shipment therefrom to the premises leased by the plaintiff"—It may be in those two places, although I don't know, but while in such premises—C—no, and, D, "during transportation to and loading on the carrier and down to the moment of departure"—I say to your Honors that there is no Customs supervision, there is no Customs personnel, there are no Customs personnel assigned to that.

Judge Bonsal: Mr. Galt, your point is, is it, that the Federal Government is not doing its job? Certainly the purpose of those regulations is to see that bonded liquor does not find its way to buyers in the State of New York. What you are really saying is, is it, that the Federal Government is not doing its job in seeing that this bonded liquor does not get to New York purchasers?

Mr. Galt: I am not accusing the Federal Government [fol. 121] of anything. It would be unbecoming, and in no sense am I here to try the Federal Government.

Judge Bonsal: Let us follow another point. Your point is, as I understand it, your dispute on the facts is that the Federal operation of the Customs and this fellow's operation in Idlewild create a situation where these liquors may wrongfully reach purchasers in the State of New York because of lack of supervision; is that right?

Mr. Galt: If your Honor please, it may be that there are rich possibilities for diversion, but our case need not rest and does not rest on that alone. Unlike Mr. Tuttle's suggestions to me, or possibly in his reply brief, we feel not bound in the slightest to offer any proof that there is diversion. But what I do say—and I want to make our position clear to the Court—what I do say is that here you have a situation where the Federal Government, two and a half years before operations commenced, in a communication of an intradepartmental nature, an intradepartmental communication, which certainly is not binding on us, and which certainly does not constitute, in my opinion, a ruling of anywhere near the significance or a ruling of any [fol. 122] kind, such as the plaintiff claims it to be. They set up a procedure, and these people started.

They knew two and a half years later— They waited two and a half years—what our attitude was. Customs didn't consult us. I don't say they are bound to consult us, but I do say when they set up this procedure—and I am not challenging their good faith for a moment—these people couldn't comply with this procedure, and they don't comply with this procedure.

Customs can have all the forms they want, and these people can have all the forms they want, but the substance isn't there. In no sense can the Federal Code be complied with by this operation.

As the facts will develop, I think your Honors will see that what you have here is a situation where, playing it by ear, as it were, the Federal Government, or the Customs Bureau, more accurately—I don't know what the Treasury Department, the Alcohol Tax Unit or any others do—and, incidentally, this is not a letter from the Secretary of the Treasury, and if we need to produce authority as to the lack of efficacy of this letter, we will do it. But what I wanted to point out was that even under this letter, the plaintiff does not comply with the procedures set forth, [fol. 123] even in that non-binding letter, and that these people can't have forms and can't have supervision which matches the situation.

There is no bonded area at this plaintiff's present premises. There is no bonded warehouse at this plaintiff's premises.

I say that the United States Customs Bureau cannot and should not authorize a procedure which is in conflict with its regulations. I say that this conflicts with its regulations. I say that much of this liquor is imported liquor, does not come from a Class VI bonded warehouse—at least sixty per cent on what I will show to be the plaintiff's own admission—that this whole thing is a procedure so loose, so ridiculous, that I can't see how the State of New York is going to avoid having its rights jeopardized.

This has implications, because things of this nature more or less are going on in other states, and we are dealing with liquor—

Mr. Tuttle: Oh, well—

Mr. Galt: —which has always been the subject of special treatment by the United States Government.

Judge Dawson: Let us stick to the facts and leave the observations until—

Mr. Galt: I say to your Honors that this is a bird's [fol. 124] eye view of the dispute between us.

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Hays: I think we ought to proceed with Mr. Tuttle's case.

Mr. Galt: May I have permission to move this lectern to the side, your Honors?

Judge Bonsal: Yes. It would be better for us, too.

Mr. Galt: Thank you very much.

Judge Hays: Let us get to your case, Mr. Tuttle.

Mr. Tuttle: Yes, your Honor.

I think I am entitled, particularly as the very pertinent observation of Judge Bonsal points out, to say something about our viewpoint as to this case. I think this presentation by Mr. Galt has been helpful because it pinpoints the fact that what the State of New York is doing in this case is claiming—not that there is any injury to the State of New York; they don't claim, as was sort of impliedly admitted by Mr. Galt, that there was a diversion of a single bottle into the State of New York. Their answer does not contain any affirmative allegations or any new matter, certainly not to that effect—not a word to that effect. And if there were diversion to the State of New York, if [fol. 125] New York was affected in the slightest by the fact that a bottle dedicated to export, as this shows on its face, comes through the State of New York to an airplane and isn't delivered to the purchaser until he arrives in Europe—New York has nothing to do with this except and unless it claims that it can inject itself into what is being done by the Federal Government in promotion of the policies of the Federal Government, in the interest of the nation and its citizens and its industries, in competition with foreign industries, to permit this kind of tax-free, duty-free import.

Now, they are in effect saying that we are asking this Court—and we have the right to have the Court sustain us in saying that the Federal Government is not doing here, as we interpret its regulations, literally this, that and the other thing which should be done, although the opinion of the Attorney General doesn't contain a word to that effect. Everything you have heard from Mr. Galt today is not in the opinion of the Attorney General. It is a second thought. It is an effort to take hold for a second time of this case and make a new case out of it.

We went to the Supreme Court of the United States on the simple question whether or not the opinion of the [fol. 126] Attorney General on this single point was a sound one in view of the exclusive power. This isn't a case

of pre-empted power. This is a case of exclusive power. And we are saying, and we will submit authorities to the effect that the State of New York, as expressed in the opinion of the Attorney General, has no right to attack collaterally, or, put it this way, has no right to inject itself and say that because we can't give you a license, you are illegal.

Your Honors know perfectly well that the Supreme Court has decided over and over again that where there is foreign commerce a state cannot impose a license or a tax.

I have annexed to our complaint the extraordinary paradox here. I have given you in the complaint, Exhibit C, a publication by the New York State Tax Department that they have no jurisdiction to tax this kind of business.

And bear in mind: this is not only wines and liquors, but this is done in other things. The same policies have enabled our economy travelers to buy things cheap in this country by virtue of being free of tax and duty and get advantage from that in the promotion of our own industry and not have to pay the higher prices that they would [fol. 127] have to pay abroad.

I think your Honors can take notice of the fact, judicial notice of the fact, as no one can possibly dispute it, that the national government has international arrangements with foreign countries of reciprocity on this thing, so what is really being decided here is, if it is on the Attorney General's opinion, and that is what we went to the Supreme Court on—we never heard all this talk that Mr. Galt has been giving today—it is perfectly plain that the State of New York is just trying to veto what the Federal Government does in this broad policy—

Judge Dawson: I think, Mr. Tuttle, you probably led on to it. I took the Attorney General's opinion as a statement of facts, and I asked you if you would take it as a statement of facts, and you would not.

Mr. Tuttle: I take it as a statement of facts.

Judge Dawson: You would not earlier. You went into all this yourself.

Well, now, I think we better get proof of the facts.

Mr. Tuttle: May I just complete my sentence?

Judge Dawson: Surely.

[fol. 128] Mr. Tuttle: What I am saying now with reference to the Attorney General's opinion has nothing to do with this recitation of facts. It is the legal point and the sole legal point that because, according to him, the State of New York could not give their license, could not give this kind of thing which we are doing a license, that therefore we are entirely subject to suppression, irrespective of any viewpoint of the Federal Government.

Now, that is the legal point, and I am saying that when we presented our case in court here to these judges below and to the Supreme Court, that was a legal point which we were fighting, and now, when we get back here, it suddenly does not become the legal point, but we are told that the Federal Government is in effect not performing its obligations according to its own rules and regulations.

I am going to submit to your Honors as fundamental in this case, that that isn't a tenable position to bring forward in this case.

Now, that is my view of the legal situation here, and, of course, it is going to be extremely vital, because if that can be done in this case, then in the case of every exporta-
[fol. 129] tion to which the government attaches some kind of a privilege for the benefit of its own citizens and industries, the State of New York can come along, either in its tax department or in its licensing department, and say, "You can't do that against the wishes of the State of New York, unless you accept our viewpoint of your regulations and let us show you that you don't comply with that viewpoint as we see it."

Now, that makes this a very serious and fundamental issue in the case.

Let me say that, as shown here, and as Mr. Galt himself has said, that what he claims is that the Federal Government's people are not filling all the gaps. When your Honor asked him whether there was a matter of diversion, he said, "I don't have to show diversion." All he needs to show is that he thinks there could be diversion.

Well, I don't know of any Government regulation anywhere which is not subject to possible violation. Our criminal courts would close up if that was not the case.

I don't believe that this plaintiff can be thrown into the ashcan simply by some kind of implication that he may be diverting something or that something could accidentally happen with it doesn't.

[fol. 130] Now, with reference to my case, I am going to pursue, your Honor, at the very beginning, because it is so fundamental with me, and I don't want to get into a penumbra situation here, where my position may not be clear: The facts I have stated are those in the opinion of the Attorney General, and I said I assert them, and I am now saying that I feel that I am entitled, in view of the opinion being on that point and the facts being stated, and they coming directly from the defendants— These are not just hypothetical facts; these are facts which the Attorney General was supplied with by them for the purpose of rendering his opinion and letting us have the opinion—I am saying that I feel that on the documents attached to this complaint and the admissions concerning those documents in the answer, I am entitled to a judgment, and I am going to ask the Court, with all due respect, to accept that viewpoint and say that on those facts and on the law, which I have tried to stress and which I am prepared to brief even more fully than I have in my reply brief, because these things come on so suddenly that I was not able to make all the researches that I have since been able to make, that we are entitled to a judgment, and I am respectfully moving for it.

[fol. 131] Now, I also feel that in connection with that, I ought to be allowed to see the two letters from the Liquor Authority to the Attorney General that are recited in his opinion, and I back that up with a decision very recently made by the United States Court of Appeals.

I assume from my discussions with Mr. Galt that he is going to claim some kind of privilege.

Mr. Galt: No.

Judge Hays: Mr. Galt indicates that he is not going to claim it. Are you about to produce the letters, Mr. Galt?

Mr. Galt: Yes, your Honor. I am only fishing around in my papers for them, and I assume Mr. Tuttle will give me similar courtesies when we ask for the letters leading—if we should—to Exhibit A.

Mr. Tuttle: Well, I am not going to get into any broad commitments in advance of the situation at all.

Mr. Galt: It is all right, Mr. Tuttle. I am not asking for any commitment.

Here are the letters.

Judge Dawson: Now, you have the letters.

MOTION FOR JUDGMENT

Mr. Tuttle: Before I even look at the letters, I want to respectfully place before the Court on what we have and the admissions in the answer that I am entitled to judg-
[fol. 132] ment, and I so move, now.

Judge Dawson: You don't intend to put any further evidence in?

Mr. Tuttle: Oh, no. I am making a motion, which I believe I am entitled to make. I will guide myself—

Judge Hays: If this motion is denied, you intend to proceed with the production of evidence; is that correct?

Mr. Tuttle: If the motion is denied, I certainly intend to proceed with the introduction of evidence.

Judge Hays: The Court will reserve decision on the motion. Go ahead with your evidence.

Mr. Tuttle: I would like a moment's opportunity to look at these letters. I asked for them some time ago, and here they are.

OFFERS IN EVIDENCE

I will now offer in evidence the first of these two letters. It is dated April 22, 1960 and is a part of the recital in Exhibit B attached to the complaint, being the opinion of the Attorney General, which in turn was forwarded to us by a letter of the State Liquor Authority which is dated July 11, 1960 and is Exhibit C attached to the complaint.
[fol. 133] I offer this letter of April 22, 1960, as Plaintiff's Exhibit 1.

Judge Bonsal: Mr. Galt, have you any objection?

Mr. Galt: May I see the letter a second, your Honor?

Judge Bonsal: Yes.

Mr. Galt: If your Honors please, I object to the admission of this into evidence, which, of course, is for the purpose of establishing the facts contained.

This is a request for an opinion. These facts are facts given to us from sources that the State Liquor Authority can get them from, which could be any source, the plaintiff's version of the facts, and they are in no wise competent, relevant or material, and the Attorney General's opinion as a matter of law will speak for itself.

May I say that the complaint does not challenge the Attorney General's opinion in the sense that the conclusions of law are argued with on the basis that Mr. Tuttle has been suggesting. What they are saying is that the State has no jurisdiction, irrespective of the Attorney General's findings there.

We do not concede these facts. These are facts furnished to the legal officer of a state for his opinion. As evidence [fol. 134] in a court they are no evidence at all, and I think the proposition is too elementary to require further discussion.

Mr. Tuttle: I don't think it is elementary at all that way. Here is a communication of a factual character from the defendants, asserting facts, and on those facts they ask an opinion of the Attorney General, and that letter and the other letter I am about to offer are embodied in the opinion of the Attorney General and furnished to us.

Now, I think—

Judge Hays: We will admit the letter on the ground that it sets forth the facts on which the Attorney General's opinion is based, confining it solely to that limited ground for the moment.

Mr. Tuttle: I respectfully would except to the limitation, but we may mark it, then, Exhibit 1?

Judge Hays: Yes.

(Received in evidence and marked Plaintiff's Exhibit 1.)

Mr. Tuttle: I next offer the second letter given by Mr. Galt to me and referred to in the opinion of the Attorney General, a letter from the Liquor Authority dated May 9, 1960, to the Attorney General.

[fol. 135] Judge Hays: Mr. Galt?

Mr. Galt: I renew my objection, and I make the further observation that this case is in no sense an appeal from the Attorney General's opinions, and I think it is most ex-

traordinary that mere matters of correspondence between client and attorney—and I am not talking about the confidential relationship—should by any stretch of the imagination be made the subject of offer for factual presentation.

Where the State Liquor Authority got these facts, they may not have investigated. They may have gotten them from the plaintiff.

All this is too loose and too ephemeral to make any possible basis for the admission of such evidence.

Judge Hays: Will you hand up the letter, Mr. Tuttle?

Mr. Tuttle: Yes, sir.

I am offering it because it is embodied by reference as the ground of the recitation of facts coming from the Liquor Authority, the defendants in this case, and also accepted by the Attorney General and summarized in his opinion factually as the basis of his opinion.

[fol. 136] Your Honors will recall what I am saying: that we started this litigation and pushed it all the way to the Supreme Court of the United States on the legal efficacy and correctness of the opinion of the Attorney General, which was simply a point of law that we were bound to have a license from the State of New York, and inasmuch as the legislation did not grant it to us, we could not get it, and we were therefore illegal in our operation.

Judge Hays: Same ruling with respect to this letter.

Mr. Tuttle: And the same exception as far as limitation is concerned.

Mr. Galt: May I state that there are also legal exceptions made by the ABC, which is no part of what Mr. Tuttle is offering and not binding on us, even when we made the ruling.

Judge Hays: They are not material here and will be disregarded.

(Received in evidence and marked Plaintiff's Exhibit 2.)

Mr. Tuttle: Would your Honors give me a moment to consult with my associate?

Your Honors, on the strength of these letters, now that [fol. 137] they are in the record, I renew my motion for judgment. I assume, however, your Honors will take that under advisement, and so I will proceed with further steps.

May I assume that?

Judge Hays: You may.

Mr. Tuttle: I will call Mr. Giliotti.

ARTHUR GILIOTTI, called as a witness by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Tuttle:

Q. Mr. Giliotti, what is your relationship to the plaintiff?

A. I am president of the firm.

Q. Have you been president of this corporation from its inception?

A. I have.

Q. And, as president of the corporation, tell us whether you are familiar with its operations.

A. I am familiar with the operations.

Q. And you have been from the time the operations started?

A. Right.

[fol. 138] Q. Who has been your corporation's counsel from the time the operation started? I see the name of Mr. Kelly in these letters.

A. Yes. Mr. Kelly has been with the firm from the beginning.

Q. Of what firm, because I want to identify the firm.

A. Idlewild Bon-Voyage Liquors.

Q. Were you, at the time you started operations, aware of this letter from the Treasury Department, signed by Mr. Strubinger and dated April 15, 1958?

A. I was.

Q. Did the plaintiff receive a copy of that letter simultaneously with its being sent to Mr. Dill? I show you a paper.

A. Yes, sir. This is the letter.

OFFERS IN EVIDENCE

Mr. Tuttle: I will offer this in evidence as the copy which the plaintiff received. It is dated April 15, 1958. Otherwise, it is exactly the same as Exhibit A attached to the complaint.

Mr. Galt: My objection is not based on the fact that it is a copy or as to its authenticity insofar as signature is concerned, but I do most vehemently object to the admission of Exhibit A in evidence for a great [many reasons]. [fol. 139] In the first place, it is hearsay. It is between two other parties and as to facts which did not even come into operation until two and a half years later and as to a hypothetical set of facts. As to the truth of the facts contained in that letter, it is certainly hearsay.

Again, I object on the ground that it is not from the Secretary of the Treasury and that it is not in any sense a ruling binding in any sense on either the Department or certainly on the defendant.

Again, I want to object to its irrelevancy, that it is not consistent with Federal laws, rules and regulations. No foundation has been laid for its admission. There is correspondence mentioned in there. There are facts, so-called facts mentioned in there, and no proper foundation has been laid for its admission. I therefore strenuously object.

I will also, if need be, produce authority that this is not in any sense a rule or a regulation which is authoritative in the nature of a license or a permit or in any sense binding on the Court of anyone else.

If need be, I can cite a case, Miller Land & Livestock Company, 56 Fed Supp 34, District Court of Montana, 1944. [fol. 140] I think that should dispose of this offer in evidence.

Judge Hays: I will overrule the objection and accept the exhibit.

(Received in evidence and marked Plaintiff's Exhibit 3.)

By Mr. Tuttle:

Q. At the time when this letter was received, did you know who Robert W. Dill was, as an official?

A. Yes; I did.

Q. What was he?

A. Collector of Customs.

Q. At—

A. At New York.

Q. And do you know how long he had been?

A. No: I do not know.

Q. Do you know who at that time Mr. D. B. Strubinger was?

A. Not at the time that we received the letter, but I was informed who he was.

Mr. Tuttle: Well, there cannot be any dispute that he was then the Acting Commissioner of Customs at the time.

I am sorry, your Honors. We had a paper here—I saw [fol. 141] it at the office.

Judge Bonsal: Does this have to do with the location of the shop in the airport?

Mr. Tuttle: Yes, sir.

Judge Bonsal: Is there any dispute about that? Is there any dispute about the size or the location of the shop at Idlewild Airport? We might save some time.

Mr. Galt: There is no dispute as to the size of the shop or its location, that it is located on the second floor of the Arrivals Building of Idlewild Airport.

Judge Bonsal: You would have no objection to that?

Mr. Tuttle: What I am looking for, your Honor, and what we certainly had at the office, is for this purpose: I want to show that the plan, the layout was at this time prepared by—May I get it? It is in my briefcase. May I be excused?

Judge Bonsal: Yes, indeed. Go ahead and get it.

The Witness: I thought I had it.

Mr. Tuttle: I can proceed to something else.

Judge Dawson: Why don't you go to something else and come back to that after lunch?

Mr. Tuttle: Yes. I can proceed without it.

[fol. 142] Q. Did you, after the receipt of this letter, employ an architect and prepare a plan for what would be your quarters in the Arrivals Building at Idlewild?

A. At the time— At the receipt of this letter here, I departed for Idlewild, for Mr. Burton's office for approval of an approved warehouse, so that—

Mr. Galt: I move to strike that as not being responsive.

Q. Who is Mr. Burton?

A. Mr. Burton is the Chief Collector at Idlewild.

Q. What else did you do?

A. I spoke to Mr. Cromack, who is the Assistant Collector at Idlewild, and he told me exactly what would be required. Upon receipt of this information, I informed my architect exactly what has to be done, and the plans were brought down to the Collector—Chief Collector of Customs at Idlewild for approval.

Q. And you showed them, submitted them for approval?

A. Right. I submitted them for approval.

Mr. Galt: Objected to as calling for a conclusion.

Judge Dawson: What conclusion are you talking about?

[fol. 143] Mr. Galt: Submission for approval. He has not said how he submitted them.

Judge Dawson: Well, that does not call for a conclusion. That is ridiculous. Overruled.

Mr. Tuttle: The missing nugget has been found, your Honor.

Q. Is this the plan that your architect drew up and you submitted in the form in which you stated and under the circumstances you have stated?

A. This is it.

Q. Yes; and who was the official, you said, who approved that?

Judge Hays: He didn't say anybody approved it. He said it was submitted for approval.

Mr. Tuttle: Yes. Submitted.

The Witness: It was submitted for approval, and Mr. Cromack, who is the Assistant Chief Collector at Idlewild, approved the area.

Q. As part—

A. And told me to set up my room as specified in this diagram.

Mr. Galt: I move to strike so much of the answer as is not responsive. He was merely asked if he submitted it for approval, to whom.

[fol. 144] Judge Hays: Denied.

Mr. Tuttle: I would like to offer this diagram in evidence.

The Clerk: Objection?

Mr. Galt: I object to that on the ground it is hearsay and no proper foundation laid to show that it is in accordance with any prescribed rules or regulations and nothing to show that it was approved or this was approval in any sense.

Judge Hays: There is nothing on the diagram which indicates it.

Mr. Galt: Or that there was authority to approve it.

Judge Hays: We have evidence that it was approved. The objection is overruled. The exhibit is accepted.

(Received in evidence and marked Plaintiff's Exhibit 4.)

Q. After that, with reference to the space, did you proceed to construct—

A. Yes. Upon approval of the area, we also asked for approval of our forms, which we had set up, and we were told to comply with as per presently operated by the [fol. 145] cigarette—the tax-free cigarettes.

Our plans were also submitted—Our proofs were submitted at the same time, and most of my dealings there were with Mr. Cromack and Mr. Burton, and they approved the forms, which were identical to the cigarettes. And then we went ahead, gave the word to the architect to prepare the area. The printers were told to print.

Upon the completion of the room, we went to Customs at Idlewild and told them that we were ready to operate as soon as we got the okay from their office, and I don't recall whether it was approved for April 13th or April 14th of 1960, but we had set plans for that, and when the area was completed, we requested Customs to come in and look the situation over, which they did. They looked it over, and they approved it and said, "Fine, go ahead. Operate. Good luck. And, don't forget, prescribed as per the rules and regulations set forth." And that we did.

On the morning of the opening, we went into Mr. Burton's office, where he was there with Mr. Cromack, and I said, "Well, we are ready to open. Can we start business?" And they said, "Yes, you may proceed."

Mr. Galt: I move to strike as not being responsive and as containing hearsay.

[fol. 146] Judge Hays: Denied.

Q. You referred to cigarettes. The plaintiff had no connection with that company?

A. None.

Q. Are they one of the industries that get a certain tax-free for export—

A. Would you repeat that again, please?

Q. Are they one of the companies that do get from the Federal Government the privilege of tax-free for export?

A. Yes; they are.

Mr. Galt: Excuse me, your Honors. I didn't hear that.

Judge Bonsal: Would you like to come up? You are a little far away. You may be having trouble.

Mr. Tutttle: I will stand back, your Honor. That may help.

Judge Bonsal: Yes. I think Mr. Galt has been having trouble hearing the witness.

Mr. Galt: May I ask if the Reporter—

(Record read.)

Mr. Galt: Is that your company he is referring to?

[fol. 147] Mr. Tuttle: No. He said that in talking with the Federal Customs people, they had told him to follow the design of the cigarette place.

Mr. Galt: Oh, I see.

I object to that question, then, as calling for a legal conclusion on the witness' part.

Judge Hays: Overruled.

Q. Now, Mr. Giliotti, will you state where this location of yours is?

A. Our rented space from the Port Authority is at the Idlewild Airport in New York, at the Arrival Building, on the second floor, Room 2123, next to the tobacco—tax-free tobacco, overlooking the Custom area, main area, that is, and across from the Chief Collector of Customs at Idlewild.

Q. And you say across from. You mean there is a hallway that separates you?

A. They call it the goldfish bowl. It's right across, on that angle.

Q. It is opposite, you mean?
A. Opposite.

Judge Bonsal: Why are you in the Arrivals Building when I understand your business deals with outgoing passengers?

[fol. 148] The Witness: Well, your Honor, the majority of the airlines that are departing Idlewild depart from the Idlewild Arrivals Building, because all the foreign airlines are set up in this locality. There are only a few that have their own terminal building.

Judge Dawson: Do you operate in any space except that space in Idlewild—your company?

The Witness: Your Honor, we have two counters besides our Room 2123. One is in the Pan American Terminal unit, and one is in the TWA Terminal unit.

Judge Dawson: And do you have liquor on display in those counters?

The Witness: No, sir. All we have is a counter, as I have here, with a telephone, a sign and—and a telephone.

Judge Dawson: And you take orders at those counters?

The Witness: We take orders and transmit them to Room 2123.

Q. From that counter they are telephoned in to Room 2123?
A. Right.
Q. Now, you spoke of lease from the Port Authority.

Mr. Tuttle: I will offer in evidence this lease, which [fol. 149] Mr. Galt has already received, seen and examined, and I assume, therefore, without testimony it may go in as the first lease, and then I will offer the renewal separately.

Mr. Galt: No objection.

Judge Hays: Received in evidence.

(Received in evidence and marked Plaintiff's Exhibit 5.)

Q. This paper fell out. Is that part of the main lease?
A. This is part of the main lease.

Mr. Tuttle: I will say, your Honors, that the clauses which have caused me to put this lease in evidence particu-

larly are 6 and 21, because they contain a right to the Port Authority in case of any violation of law of any character or rules and regulations—they can terminate the lease on notice.

In the same way, I will offer as the next exhibit the extension. The main lease was October 31, 1956, and this extension is dated April 2, 1962.

Mr. Galt has also seen this.

Judge Hays: As I understood it, he has no objection, Mr. Tuttle.

Mr. Galt: No objection. I am sorry.

[fol. 150] (Received in evidence and marked Plaintiff's Exhibit 6.)

Q. Now, with reference to the two counters, in connection with the two at International Airlines that was specified, did you have a three-party lease for the space that those little counters occupied?

A. That's correct.

Q. And I show you one. Which is that? It is on the letterhead of the Port Authority.

A. Well, this is with the TWA.

Mr. Tuttle: All right. I will offer that.

Mr. Galt has already seen these.

Mr. Galt: No; I haven't.

Mr. Tuttle: Oh, you haven't?

Mr. Galt: No.

Mr. Tuttle: All right. Take it.

Mr. Galt: I won't waste the Court's time.

No objection.

Judge Hays: Received.

(Received in evidence and marked Plaintiff's Exhibit 7.)

Mr. Tuttle: I will say that that contains the same penalty clauses that I have already called attention to in the main, basic lease. This second one that I will offer is with the [fol. 151] Pan American and the Port Authority.

Judge Hays: Mr. Galt has not had an opportunity to examine it.

Mr. Galt: No objection, your Honor.

(Received in evidence and marked Plaintiff's Exhibit 8.)

Q. Now, Mr. Giliotti, are there certain forms prescribed by the Customs Bureau for use in connection with your business?

A. Yes.

Q. I show you one entitled Customs Form 2512.

Mr. Galt: Objected to.

Mr. Tuttle: Wait until I get the number right.

Mr. Galt: I am sorry.

Mr. Tuttle: I have arrived at the age, your Honors, where sometimes I have to have a little help.

7512.

Mr. Galt: I object to so much of the question as asked the witness for his conclusion as to whether they are prescribed by Customs as beyond his knowledge and competence.

Mr. Tuttle: Well, he knows what is required of him, your Honor.

[fol. 152] Judge Bonsal: Well, he was asked to fill them out.

Mr. Galt: I don't know, your Honor. I certainly don't think he knows what is required or prescribed.

Judge Hays: He has not answered the question yet, but I take it he is going to answer it "yes", and I want to know what makes him think it is prescribed.

The Witness: Your Honor, this Form 7512 is a Customs form. May I—

Mr. Tuttle: Just answer the question. What makes you think that they are prescribed?

The Witness: Because on this Customs form it appears the vessel number, which a shipment of liquor has arrived in, and it is filled out from where it is originating, how it's been transported and the Custom that's located in that area, plus the consignee of that location, and at the right hand corner it carries an entry number, which is assigned by Custom, indicating that on that entry number there are X amount of cases which arrived on such and such a vessel. On the bottom here it carries, we will say, fifty cases remaining on this vessel's supply over here, number, and the number that I have withdrawn is deducted, giving them a balance of what is left on this entry number, and it is

[fol. 153] signed by the bonded warehouse at the location where I draw, which is outside of New York City. It is signed by the Customs Inspector on duty, and it is signed by the trucking, which is a bonded firm delivering to my area, which is located in Room 2123 at Idlewild International Airport.

Q. In other words—

A. May I proceed?

Q. Yes.

A. And one copy of this form from here goes by mail to Customs Office at Idlewild Airport, indicating to them that we are about ready to receive a shipment from Lipschutz warehouse, we will say. One copy I get with my invoice from Lipschutz, and the remaining copies I have—Let me say I only know of the third copy that is accompanied with the shipment with the trucking firm's stamp to be delivered to Customs at designation.

That's about what—

Mr. Tuttle: I offer this on the strength of the testimony as a basic form which starts the withdrawal by which he gets his liquor, and it is—

Judge Bonsal: Mr. Galt would like to see it, Mr. Tuttle. Will you show it to Mr. Galt?

[fol. 154] Mr. Galt: I object to the admission of this into evidence.

First of all, this is not a form filled out, according to the witness' own description, by him, but done entirely by others. It is hearsay as to that.

Moreover, this is a blank form on which have been inserted certain entries, of course having no reference to this plaintiff or his operations, and it is printed here. I don't know that this could possibly be the same form which he uses or which is used in connection with—

Mr. Tuttle: I am perfectly glad to leave out the reference to the particular information and introduce it as a blank form.

Judge Bonsal: It is a form used in the movement of bonded liquor.

Mr. Tuttle: That's right. It is a basic form.

Mr. Galt: As a basic form used in the transportation of bonded liquor, I have no objection to it. But as being a prescribed form, prescribed for him to use, that I do object.

Judge Hays: Admitted as a form used in the transportation of bonded liquor.

[fol. 155] (Received in evidence and marked Plaintiff's Exhibit 9.)

Mr. Tuttle: Now, your Honor I have prepared and furnished myself with three copies of each of these forms. I am not utilizing these forms for any of the typewritten entries. I will ask your Honors to disregard those and just consider the printed matter, because this is what has to be filled in.

Judge Bonsal: Have these been identified, Mr. Tuttle?

Mr. Tuttle: Yes, as copies of Exhibit No. 9, just offered in evidence for the convenience of the Court.

Q. Now, you have stated that the next step in the movement of this liquor would be to a bonded trucker; is that right?

A. Yes.

Q. And does he in turn have a form which he has to fill out or which—

A. He arrives with the form in duplicate.

Mr. Galt: Objected to as calling for hearsay and matters beyond the witness' knowledge.

Judge Hays: How are you familiar with what the trucker has to do? You don't engage in the trucking business?

[fol. 156] The Witness: No, sir, but I am familiar that the vehicle must be a bonded vehicle to transport liquor and must be licensed by each state as it crosses, and that he arrives in my area with the 7512 in a sealed envelope.

Judge Hays: That is the one we have here?

The Witness: Right.

Judge Hays: He has a copy of it, as you testified before?

The Witness: Right, which is stamped "To Be Delivered to Customs", and his name appears on that, also, on the bottom, on the right hand side. And he arrives with an invoice or bill of lading indicating how many bottles—cases of liquor he is bringing into our area and the locality where he picked it up for transportation to our area.

His vehicle, incidentally, is also bonded to the extent that before we start to unload and okay it, they carry a bonded seal, which is placed on the doors and only broken upon the arrival of the liquor at Idlewild and cannot be opened unless the seal is broken.

Judge Bonsal: Who supervises the breaking of the seal?

Q. Are those customs procedures?

[fol. 157] A. I don't know, sir.

The Witness: I don't know, your Honor. I know it has a number and "Davidson" on the tag. No doubt, it must be approved.

Judge Bonsal: Who is there when the seal is broken?

The Witness: We are, sir.

Judge Bonsal: You alone, and the trucker?

The Witness: The supervisor, my man, and the trucker.

Q. Now, you spoke of receiving from the trucker a form. Is what I now show you one of those forms? I am not referring to the particular typewriting on it, but I am referring to it as a form.

A. This form, the blue form here, arrives in duplicate. On this form here it indicates the amount of cases on board that truck.

Judge Hays: Is this what you referred to as the invoice?

The Witness: No. This is the trucking receipt. This is not the invoice. The invoice is from Lipschutz & Co., which he is the warehouse owner. Upon the receipt of 130 cases, which indicate in this delivery receipt, and the 7512, which [fol. 158] could be a mixture of different brands. It doesn't have to be all, let's say, King George or Vat 69. It could be a mixture of possibly fifteen brands.

We sign this receipt and acknowledge that we have received it intact. The trucker leaves us one copy and he takes the original and, of course, as you know, this is the invoice from Preston & Co. for the payment of the amount of the cases delivered to us.

Judge Bonsal: So that is in effect a receipt that you have received the shipment described?

The Witness: That's right, sir.

Judge Hays: This has nothing to do with Customs. This is a private business matter between you and the supplier; is that right?

The Witness: Well, on here, your Honor, it says "In Bond". It's repeated ten times.

Judge Hays: But this is not a Customs form?

The Witness: No. I don't believe it is, sir.

Q. It is in duplicate. Does one go to you?

A. One remains with me.

Q. And what do you do with that one, with respect to your records?

A. Well, can I go through the whole routine of how [fol. 159] I receive the liquor?

Q. Well, I guess that is the simplest way to do it. Proceed.

A. Well, I need my files here. May I?

Judge Bonsal: Can you hear all right, Mr. Galt?

Mr. Galt: If the witness would raise his voice a bit, it would help.

Judge Bonsal: Would you like to come up to the first jury chair?

Mr. Galt: Then I would be separated from my papers. Thank you very much—

Judge Bonsal: You speak up, if you can't hear.

Mr. Galt: I appreciate the suggestion, your Honor.

The Witness: May I continue?

Q. Continue, please.

A. All right. Our orders are placed outside of New York State. We deal with Lipschutz in Philadelphia, Pascal in Washington, Connor in Baltimore. We place our orders either by phone or by mail. One day prior— Well, let me go through this.

Upon receipt of our order, Lipschutz & Co. prepares this [fol. 160] 7512 and submit it to Customs in Philadelphia, and they go through the procedure which I explained before, and Customs indicates an entry number that the liquor must be exported under.

Upon arrival here— Then they mail a copy to us and mail a copy to Customs in New York at Idlewild, indicating that Idlewild Bon-Voyage Liquor is ready to receive a

liquor shipment from this warehouse, and their copy received is stamped "Air Mail Copy".

When the shipment arrives, which he has this—the trucking papers and the 7512, which must be presented to Customs at Idlewild, the Customs papers are in a sealed envelope with possibly four or five staples on them, and the trucking receipt is attached to it.

Needless to say, the items are opened; we check to see that they jibe with the orders we put in, and if they do, we start unloading our liquor when the bonded vehicle arrives in the east wing of the International Building right next to our area, next to the main Customs area at Idlewild. It's only about forty or fifty feet from it.

My personnel, the personnel of Idlewild Bon-Voyage Liquor, unloads the liquor in carts. The trucker counts them when they go over, and we count them when they come upstairs.

[fol. 161] When the last box is received—case—and our records jibe with their records, with the trucking records, and there is no indications of any kind on the bottom here that there is a difference of maybe nine bottles in a case, or whatever the case may be, we then sign it. If there is any differences whatsoever, then we contact Mr. Johnson, who is inspector, a Customs Inspector at Idlewild, on the staff of Mr. Burton, and we make it known to him that there is a discrepancy in the shipment. And it is also signed in a trucking receipt that there is that discrepancy.

Judge Bonsal: You sign that trucking receipt up in your own premises after the liquor has been brought upstairs?

The Witness: After we have received all the shipment in our bonded, approved area.

Judge Bonsal: In your premises. And before you sign that, it goes down to the truck driver?

The Witness: Right.

Mr. Galt: I move to strike the answer of the witness on the ground that except from the point where it reaches his premises, it is all hearsay, as far as his operation is concerned.

Judge Hays: Overruled.

[fol. 162] A. (Continuing) When this form has been finished, the truck driver leaves our area. We then prepare a certificate of use, usage, which was approved by the Customs, Collector of Customs at Idlewild, that we indicate in this certificate of use the kind, the brand, unit of issue, the number of bottles, and the entry number which appears on this 7512.

When this form is completed, with all that information and the date of arrival, this information is immediately taken downstairs to the Customs Collector, Mr. Johnson, for his file. This is the 7512, which reads, "To be delivered to Customs."

Now— Now I have the liquor in the approved area, and I have the papers signed; I have all the records. Now, the only thing is the—

Q. The last form you referred to—

Mr. Tuttle: I should offer that. Well, before that—

A. This here, sir?

Mr. Galt: If your Honors please, I did not want to interrupt the colloquy and the witness, but I think he said he has a liquor approved area. That is definitely a conclusion on his part. I don't know that the term has any significance, legally or otherwise, but if it is intended [fol. 163] to suggest that he has an area approved or equating in any way or complying in any way with Customs regulations, I suggest that there is no foundation for that assertion, and it should be stricken.

The Witness: Well—

Mr. Tuttle: I will make it.

He showed the diagram according to which the area was to be used and testified as to its approval. In other words, he is now saying that the liquor is brought into that approved area, where he does business.

Mr. Galt: If your Honors please, the fact that plans may have been drawn—a thousand plans—

Judge Hays: We understand his reference is to a liquor approved area and means only approval of the area he testified to, with no other legal significance.

Mr. Tuttle: Well, I except to "no legal significance."

Judge Hays: No other legal significance than that to which he has already testified.

Q. Just one question on that subject: Is this the same area, constructed the same way, that you have been occupying from the time that diagram you showed the Customs officials was approved?

A. Yes; it is.

[fol. 164] Q. Right down to the present?

A. Right.

Q. Now, just tracing that practice of the business—

Mr. Tuttle: I will offer in evidence as part of the witness' testimony the paper that he referred to in duplicate, a white top sheet and a carbon green sheet, it being the trucker's document.

Mr. Galt: If Mr. Tuttle will state that that is not what has been described by the witness as a Customs prescribed form, I offer no objection.

Judge Bonsal: I think the witness said it was not a Customs prescribed form.

Mr. Galt: I thought so, too. If your Honors please, I want to make certain that that was done.

Mr. Tuttle: May it be marked?

Judge Hays: We will receive it.

(Received in evidence and marked Plaintiff's Exhibit 10.)

Mr. Tuttle: I will hand up three copies of that exhibit just marked in evidence.

Q. Now, the next document to which you alluded was the one in which the entries were made by you on receipt. What do you call that document?

[fol. 165] A. Record of usage.

Q. Record of usage. Is this blank form, except for some lead pencil marks which are there to show merely how the columns are started to be filled up, the document you refer to?

A. These are the documents.

Q. And that is in duplicate?

A. That's in duplicate.

Q. With the carbon paper between them, so that the duplicate will be an exact copy of the original?

A. Right, sir.

Mr. Tuttle: I offer this in evidence.

Judge Bonsal: Has Mr. Galt seen this?

Mr. Galt: No objection, provided it is also understood that it is not a Customs form or Customs prescribed form.

Mr. Tuttle: Wait a minute—

Mr. Galt: Or not being offered as a Customs form or Customs prescribed form.

Mr. Tuttle: I am offering it as part of what he has testified to.

Judge Hays: He has not testified it was a Customs prescribed form. It will be received, under the circumstances.

[fol. 166] (Received in evidence and marked Plaintiff's Exhibit 11.)

Mr. Tuttle: I will hand up three copies of it.

Q. Now, this paper just marked Exhibit 11, as has been testified, provides for a carbon duplicate. What is the disposition made of these two, the face sheet and the carbon sheet, after the entries have been made on them?

A. Then I would have to go into the sales of the liquor to bring that—

Q. All right.

A. All right?

Q. Let me put it this way: Where does the original go in the first instance? Where is it kept?

A. Well, this is kept in our area until the entry number—the amount received on that entry number has been exhausted. When the balance is zero, we take this down to the Customs Inspector, Mr. Johnson, which he checks—I have no idea how, but what he does—but that's upon approval of the items which are indicated here and the passengers and the certificates have been proved, that they have been exported. Then he stamps it and returns [fol. 167] the copy to our office, and he keeps the original.

Q. When does this—

Judge Hays: When you say it has been proved that it has been exported, there isn't any proof besides this document itself.

Mr. Tuttle: I have some more forms, your Honor, which I believe will answer that. But let us stick just to this.

Q. Now, when does he get the carbon copy first?

A. He gets this form after we have completed the export of the amount of cases—bottles received under this entry number.

Judge Bonsal: And after the bottles have actually been delivered to the plane, you make the entry?

The Witness: No, sir. After the entry number has been exhausted, not after every delivery.

Q. That is simply an in-and-out entry of your inventory; is that it?

A. To keep a balance on hand of what we have on hand—a record, rather.

Q. And that balance can be seen, so far as a record is concerned, from that paper?

A. Right.

[fol. 168] Q. And you have in these premises of yours whatever in the way of stock there is, the difference between the in and the out; is that it?

A. Right. That is correct, sir.

Q. Now, going to the next step, is there any liquor, bottled liquor, displayed by you in your premises, if a prospective purchaser comes along?

A. There is none.

Mr. Galt: I object to that question. It is contradictory of what Mr. Tuttle told us, if I recall correctly, at the outset of the hearing.

In the Attorney General's opinion, one of the facts presented, presumably by his client, was that they would display liquor. It is right in the opinion, Exhibit B. He is now contradicting or attempting to contradict the fact which I thought was conceded.

Mr. Tuttle: Wait a moment.

Mr. Galt: It is in the record, Exhibit B, at—

Judge Dawson: There is no objection, is there, to contradicting something which—

Judge Hays: —which he said himself.

Mr. Galt: Mr. Tuttle said he conceded that this was a fact, that he was relying upon this as a fact, and he was [fol. 169] quite emphatic about it.

All right. If he wants to prove something contrary to his own concession.

Q. I asked if there was any display of bottles containing the liquor, and you said no. Is that true and right?

A. That's true, sir.

Judge Hays: What do they contain? Tea or something of that sort?

The Witness: Some concoction. I don't know what it is, sir. We have four bottles—

Judge Hays: There is a display of bottles, but they do not contain liquor.

Q. What you might call dummy bottles?

A. Dummy bottles.

Q. So that people can see the brands on hand; is that correct, sir?

A. That's correct, sir.

Q. Now, where is the actual liquor kept on those premises?

A. In the premises of 2128, behind our sales counter, which is separated by a wall and a locking door.

Q. And does that wall go all the way up to the ceiling? [fol. 170] A. It goes to the ceiling.

Q. And from side to side?

A. That's correct, sir.

Q. And is it the wall shown on the diagram which, before you started, you showed to the Customs people, plaintiff's Exhibit 4?

A. Yes, sir. There hasn't been any changes, sir, from that time.

Q. Yes. All right. Now, then, let us take it up at this point. A man comes along and stops at your counter in this area. Just pick it up there. What happens?

A. Well, a passenger comes into our area to make a purchase of liquor, which he shows us his ticket and his boarding card. The information which we get from his ticket is the name, the date of departure of the airline, the flight number, whether traveling economy seat or first class, and the seat number and the time of departure. Then, in the body of this invoice, we place the items which he has purchased, whether it is one or three bottles.

The invoice is torn, which is perforated here at the top. The original copy is given to the passenger, which is nu-

merical. The original copy is given to the passenger. [fol. 171] The second copy is attached to the corrugated container, which we call a carry pack, and it is gummed in the back of this No. 2 invoice copy. And the third copy is the Customs copy, which we keep in our area at all times for Customs inspection whenever they desire to make a check, which they do frequently. And the fourth copy is for the Port Authority and my accountant to record records which the Port Authority checks with our receipts and our sales to see if they jibe, and also for my accountant to make out the monthly statements.

When the package is prepared, the No. 2 copy is attached to the carry pack. The No. 3 copy is the next copy in action, due to the fact that that copy there, we take the information. That is also—

Q. Hold it. One thing at a time. Don't go to the other form yet.

You said, in other words, with the aid of carbon paper, that document you have just described is in quadruplicate; is that right?

A. In quadruplicate.

Q. Yes.

A. Which I indicated before we got a Customs approval of these forms which we are using.

[fol. 172] Mr. Galt: I object to that as a conclusion on his part. What he may construe as an approval may not be an approval of any kind at all.

These vague approvals, vague references that color the testimony are not the facts at all.

Judge Hays: He testified that he submitted all these forms to Customs and they got an approval, and that to my mind is sufficiently factual not to constitute a conclusion.

Mr. Galt: He does not even say whom in Customs he went to, how the approval was given. No written approval—

Judge Hays: You can ask all those questions in cross-examination.

Mr. Tuttle: I will offer this quadruplicate in evidence.

Mr. Galt: No objection.

Judge Dawson: You had better get to your luncheon, Mr. Tuttle, pretty soon.

Mr. Tuttle: I will now hand up to the Court three copies of the exhibit just marked for the convenience of the Court, and I will especially ask that the Court note or notice what is under the word "Important" at the bottom.

[fol. 173] (Received in evidence and marked Plaintiff's Exhibit 12.)

Mr. Tuttle: Before I take up the next step, I hope your Honors will recall my personal embarrassment and allow me to fulfill that perfectly imperative adjournment.

Judge Hays: The Court stands adjourned until two-thirty this afternoon.

(At 12:45 p.m., a luncheon recess was taken.)

AFTERNOON SESSION

2:30 o'clock p.m.

Judge Hays: This Court feels it will not be able to sit after four-thirty this afternoon, and if we do not conclude by four-thirty this afternoon, our plan is to go on tomorrow. That, we hope, may provide some motivation for concluding by four-thirty this afternoon.

Mr. Tuttle: Let me say that I thank your Honors for two things: First, the courtesy of being able to attend this conference, which was concluded satisfactorily but rather breathlessly, and, second, the inducement to finish this afternoon. I shall be as brief as I can, your Honors.

[fol. 174] ARTHUR GILIOTTI, resumed.

Direct examination (Continued).

By Mr. Tuttle:

Q. You stated that Plaintiff's Exhibit 12, the one bearing the name of a purchaser, had been completed in quadruplicate, that the yellow one of the four was attached to a carton. I want you to explain—

I correct that. The second one, the white one. I want you to explain what that carton was and how it was used.

A. Well, the carton is a corrugated box which they store —we store the liquor in for each individual passenger, and the second copy is attached, gummed-taped on to that carton that carries the passenger's name and the flight number et cetera.

Q. Is the carton when it leaves your place a sealed carton or not?

A. It is a sealed carton.

Q. And this second of the four sheets is gummed to it; is that it?

A. That's correct, sir.

Q. And what happens then?

Judge Hays: The carton is made up individually for the passenger as he places his order. You then put the bottles into his carton?

[fol. 175] The Witness: Right, sir. We have a one-, two-, three- and four-bottle package.

Q. (Continuing) Go ahead.

A. Then the third copy is recorded on— May I— May I have the delivery receipt, please?

The third copy is held in our office, and the number, the date, the airline and the flight number is recorded on this Customs approved delivery receipt, which the body carries the invoice number of the sales slip, and adjacent to that number it carries the amount of bottles sold under that invoice, sales invoice.

Should I go through the whole procedure, sir?

Q. Yes. Now that you started on it, go right ahead.

A. Thirty minutes before the departure, a member of our firm is dispatched from our area with the sealed packages and the delivery receipt which I have here—

Q. I will put it in evidence in a moment, but go ahead.

A. —and it is delivered to the aircraft in care of the person. The packages are brought aboard the aircraft, and the purser makes a count of the packages which we have on hand and checks on the bottom, received for export the amount of parcels. If that is approved by him, it's [fol. 176] signed by the delivery man and the purser. The

purser is given this copy—the copy of this delivery receipt for his—for his company file and to distribute the packages accordingly. The white copy is returned back into our area and attached to the warehouse copy.

The third copy of Exhibit 12— Exhibit 12— Time permitting, the items which are in the body of this passenger's invoice are recorded in our record of usage, which is approved by Customs, to keep a record of items on hand.

Q. That is Exhibit 11?

A. I couldn't say, sir. Eleven. On this record of usage, we indicate the date—

Q. Meaning Exhibit 11, now?

A. Exhibit 11. Incidentally, the copy of Exhibit 12, No. 3, and Exhibit 11 are used to record the items that were sold to the passenger and record of usage. We indicate the departure, the date of departure, the airline, the flight number, the passenger's name, the sales receipt made to the passenger, Exhibit 12, used for the sale of the package, and the delivery receipt, which is brought aboard the aircraft for the purser's signature, indicating export of that amount of bottles.

[fol. 177] Now, the amount that was delivered to that aircraft is deducted as we go along in the certificate of usage under that entry number which appears on the right hand corner, showing always the balance that we have on hand that we received under bond from the bonded warehouses outside of New York State.

When the whole shipment has been exhausted, meaning the balance zero on hand, it's taken down to Customs, Mr. Johnson, and he checks this form for approval, to prove export, and upon his acknowledgment that these items—

Judge Hays: You said this morning you did not know what Mr. Johnson did. Do you know or don't you?

The Witness: Well, I know, sir, that this goes with the 7512. I would like to correct that, because I do know that these are referred to the 7512, because they both carry the entry number indicated on the right hand side.

Judge Hays: So he has the 7512 down there because he got a copy of this, and he can see that all of the items listed on 7512 have been disposed of in this way; is that right?

[fol. 178] Judge Hays: All right.

A. (Continuing) He then acknowledges the export of all these items and sends up the duplicate copy, which is like up here, back to my office for my own file. But this—the receipt, I mean—the export of all bottles received under this entry number—

Q. You are speaking of Exhibit 11, now?

A. Exhibit 11.

Q. That he sends back to you?

A. The copy of it.

Q. Yes?

A. Then this form— Let me see— Eleven. Then Mr. Lipschutz in Washington has been notified that that export—that entry number has been fully exported, and that cancels the bond which he puts up for the liquor, drawing it out from his bonded warehouse, because we operate under his bond at all times, either Connor, Lipschutz or Pascal, and until this is proven that all these items are exported, they are liable for the bond.

Upon the proof of export, that bond is canceled.

Mr. Galt: May I move to strike the greater part of the witness' answer, particularly the latter part? First, there are definitely conclusions in the answer on the witness' [fol. 179] part. There are items not in evidence assumed as facts in his answer. There is a good deal of hearsay, and there are suggestions as to bonds and things of that sort, as to which there has been absolutely no proof whatsoever.

Mr. Tuttle: If your Honors please, he is describing the practice which he has been pursuing for two and a half years. I don't know who could know it better.

Judge Hays: All that he has said in fact is that this document is sent to the bonded warehouse in connection with the bond which they have and that this as far as they are concerned indicates proof of export.

That seems to me to be acceptable. We overrule the objection.

Mr. Tuttle: I think the time has come when I should put in evidence now this paper that is signed in duplicate by the purser and the man who delivered the carton to the

plane, as described by the witness. I will offer that in evidence.

The Clerk: Any objection?

Mr. Galt: I don't think so, your Honors. It is a paper—May I see it for a moment?

Mr. Tuttle: You have had copies.

[fol. 180] Mr. Galt: No objection.

(Received in evidence and marked Plaintiff's Exhibit 13.)

Mr. Tuttle: For the convenience of the Court, I will hand up the three copies of what is now Exhibit 13, and I will ask the Court to note the printed matter at the bottom.

Mr. Galt: Again, if your Honors please, I object to the use of the form in evidence except as to the fact that the form is used. The self-serving declarations, as on the plaintiff's invoice, are in no sense binding as to the nature of the transaction.

Judge Hays: The printed matter at the bottom to which you call our attention simply says, "Received For Export" a certain number of parcels "in good order for delivery to foreign port of debarkation for passengers on leaving aircraft."

I do not see any harm in that. I do not see how it helps or harms either side.

Mr. Galt: In this sense, your Honor—I am not being facetious, and I hope I am not being unduly technical at all, but we do not concede that these items are exported at all, at any time.

Judge Hays: I don't think this indicates that they are.

[fol. 181] All this is is a blank form at the bottom.

We overrule the objection.

Q. Now, in connection with the duplicates that come back to you and which you have described as received by you in the course of this business, beginning with Form 7512, which is Exhibit 9, what do you do with those four records?

A. The copy of 7512 which we received with our invoices are kept on file. The copy that we received with the shipment of liquor from out of New York State we, as soon as we record it on the record of usage, we deliver it to Customs area at Idlewild Airport, indicating that we have

received and acknowledged the amount specified on that 7512.

Q. Yes. And then these exhibits which are 12 and 13, the duplicates that you have of those: are they kept also with the others?

A. Yes. The third copy of this Exhibit 12 is attached to Exhibit 13, the delivery receipt, and kept on file, which is there for inspection at any time for Customs inspection, whoever it might be.

Q. Well, now, these records that you preserved, the four of them: Are they actually inspected from time to time by the Customs people?

[fol. 182] A. Definitely. Many times and continuously. They come into the area for many numerous conditions, and they check on our invoices.

For an example, they brought a man and said that he is from Miami Customs Division. "This is our bonded area. There is their bonded area. Would you show him how the mechanism works?" And then the Customs man took, for an example, our record of usage, which we keep a record, and took an inventory of the stock and found it is so.

There are numerous ways the Customs inspects this, and they are constantly around the vicinity of our operation, either at the area or in the field or on the airplane.

Mr. Galt: I move to strike any reference to a bonded area. There is no proof here of any bonded area of the plaintiff's whatsoever.

Judge Hays: We understand "bonded area" to mean the area in which this bonded liquor is kept.

Mr. Tuttle: Yes, because that is covered by the shipper's bond until it is delivered to the plane, and the entire stock of the shipment—

Judge Bonsal: I take it that all the witness is testifying to is as to the area, that the Customs agents operate in [fol. 183] the area where the plaintiff's premises are located.

You would have no objection to that?

Mr. Galt: If he just described it as an area, that is all it is, yes.

Judge Bonsal: Yes.

Q. Now—

A. Mr. Tuttle, may I also go on as long as you indicated—

Q. Well, if there is something more in the practice, let us have that.

A. As far as the Customs supervision of that, I believe that the group that is known as Customs searchers—

Q. I was about to ask about that. Let me put the question.

Is there a group there that are known as Customs searchers, operating in this Customs area, where you are?

A. We have Customs searchers which are out at the airport at all times. We have had experience where numerous times these Customs searchers went aboard the airplane, have checked— My man made the delivery, which he always does, on the first class section, and the Customs searchers [fol. 184] went up on the economy section, through the airplane. When my man came down, these Customs searchers asked him for the receipt, the delivery receipt that was delivered aboard the airplane, and checked, because this was obvious to me.

Further, the Customs checkers—

Q. Meaning Exhibit 13?

A. Exhibit—

Q. It is the one that is signed by the purser?

A. Right. Thirteen. And we also had a—one of these vehicles stop our man making a delivery, searching, searching our parcels, and one parcel which carries three bottles was used for a four-bottle. On that delivery receipt, in the both* of that delivery receipt it carries the invoice number and the amount of bottles. Due to the fact that a No. 3 box was used, and it was indicated four there, he insisted that my man open the carrying case. My man informed him that if he desires to, he may open it himself, but he is not permitted to open any of these containers once they are out of the area. They opened the case. They inspected—not knowing, too, that Schenley OFC—it's a bottle made like Ballantine Scotch—could be put in a three carrier.

[fol. 185] When this man reported this to me, I contacted Mr. Burton, and I asked Mr. Burton if this is permissible,

and Mr. Burton told me, yes, they can do anything they desire.

At that point, we had no other alternative but to let them inspect anything they wanted to.

Q. At any time in the period of time plaintiff has been conducting this business, have the Customs people communicated to you any finding of discrepancy in all these records?

Mr. Galt: Objected to as immaterial, irrelevant and incompetent.

Judge Hays: Overruled.

A. None were ever reported to me.

Q. I forgot one thing. Your liquor, as you receive it, is on occasion domestic liquor and on occasion foreign liquor?

A. Yes; it is.

Q. Does the domestic liquor come from a warehouse with a label on the bottle, of which this is a sample? I am not interested in the name of the brand, but I am interested in the printing matter put on by the Customs people at the top or under their direction.

A. Yes; it is. The domestic liquor has that.

[fol. 186] Mr. Tuttle: I will offer this in evidence as an illustration of what the witness was just saying.

Judge Bonsal: Mr. Galt wishes to see this.

Mr. Tuttle: Yes.

Mr. Galt: No objection, your Honor.

(Received in evidence and marked Plaintiff's Exhibit 14.)

Judge Dawson: Mr. Tuttle, the Court would prefer that you present the bottles rather than merely the labels.

Judge Hays: Much more convincing.

Mr. Tuttle: We do not display the liquor.

Judge Bonsal: They don't do it in the State of New York.

Mr. Tuttle: I am afraid they would have a good case if we did.

I haven't any copies of that, but let me say, to make it brief, that on top on the label it says, "Bottled for export under supervision of the Government of the United States of America."

Q. Now, does that label come with the bottle right into your place?

A. It does, sir.

Q. And does it go out on the bottle right into the air-[fol. 187] plane, with that label?

A. It does.

Mr. Galt: Is that as to domestic liquors only?

Mr. Tuttle: I said so. I said it was as to domestic liquor. Will you give me just a moment, your Honors?

That is my direct examination of the witness, your Honors.

Judge Hays: Very well. Mr. Galt?

Cross examination.

By Mr. Galt:

Q. Mr. Giliotti, you started your operations—when I say "you" I mean the corporation—on what date?

A. Either April 13 or April 14 of 1960.

Q. And has your operation been substantially the same at all times since that date?

A. It has.

Q. Does the plaintiff corporation have any bond?

A. We have a bond from the—

Q. Yes or no.

Mr. Tuttle: I think that the witness—

Judge Hays: I think perhaps you have to define your [fol. 188] question a little. Do you mean, any Government bond? Is that it?

Mr. Galt: Yes, your Honor. I mean any Government bond.

A. Would you mind repeating that question again?

Q. Does the plaintiff corporation have or has it executed any Government bond?

A. We do not have—we do not have a bond.

Q. You procure your liquors, irrespective of whether domestic or foreign, by order placed through suppliers. I think you gave the names of three suppliers. Is that order oral, written or what?

A. It is telephoned or written, either one, depending on the necessity of the supply.

Q. If it is written, is it on a particular form?

A. On my company paper.

Q. You mean—

A. Letter head.

Q. You mean letter head?

A. Right.

Q. Now, let us say that the supplier is Pascal. Is that the one in Washington?

A. Yes, sir.

Q. You place an order with Pascal for a certain number [fol. 189] of cases of liquors of some kind or another, or perhaps wines; is that correct?—either by phone or by mail?

A. That's right.

Q. And what happens then? How does the liquor start on its way? Where is the liquor when it is taken and started on its way?

A. That's in Pascal's bonded warehouse, in Washington.

Q. It is in Pascal's warehouse in Washington?

A. Bonded warehouse.

Q. Pascal's bonded warehouse. Did you ever see Pascal's bond?

A. Customs bonded warehouse.

Q. Did you ever see his bond?

A. No; I haven't.

Q. Did you ever see his warehouse?

A. In pictures I have, but not—I've never seen it.

Q. Did you ever see Mr. Pascal?

A. No.

Q. Do you know what kind of a warehouse it is, what the classification is?

A. All I know is that it's a Customs bonded warehouse.

[fol. 190] Q. Well, you verified this complaint in this action, did you not? You swore to the truth of the allegations made in your complaint, and you specified in the complaint what kind of a warehouse or warehouses the liquor was obtained from, did you not?

A. I indicated they are Customs bonded warehouse No. VI.

Q. Do you know if that is the kind of warehouse you get your supplies from?

A. Well, sir, based—based on this man is doing business with the UN and the embassies, I assume that he's holding that type of a bonded warehouse.

Q. It is an assumption on your part. Now, let me ask you, Mr. Giliotti: Do you purchase foreign liquors as well as domestic liquors? In other words, imported liquors?

A. I do.

Q. What percentage would you say of the total liquors that you purchase are foreign as contrasted with domestic liquors?

A. Well, I would say approximately sixty per cent.

Q. It might be more?

A. And it could be less, but I am roughly speaking. [fol. 191] Sixty per cent.

Q. You think it is six to four, that ratio; is that it?

A. That's right, sir.

Q. Do you know whether the label on foreign liquors bears the legend which Plaintiff's Exhibit—

Mr. Galt: I think it is 13, the label.

The Clerk: 14.

Mr. Galt: I beg your pardon. 14.

Q. (Continuing)—14 has, "Bottled for Export under Supervision of the United States"?

A. If that's Exhibit 13—

Q. Fourteen.

A. It's only carried on domestic, not on imported.

Q. So that at least sixty per cent of your bottles do not have that label; is that right?

A. That's right, sir.

Q. Do you not say in your verified complaint as follows —and I am reading from page 3-A: "Each bottle is required by Section"—and I am skipping the sections— "adopted thereunder and to which reference is hereby made, to be made with an export label, 'Bottled for Export Under Supervision of the United States', the use of which label for domestic purposes or purposes other than ex-

[fol. 192] port is rendered illegal by applicable laws and regulations"? Isn't that statement contained in your complaint?

So that each bottle does not bear that label. Sixty per cent of them, according to your calculations, don't bear that label; is that correct?

A. That is correct.

Q. Now, from what warehouse, if you know, from what class warehouse, if you know, would foreign liquors come, imported liquors?

A. Well, I'm not certain, but I believe that before we started operation, Mr. Cromach, who is the Assistant Collector at Idlewild, indicated that to me, that we are—

Mr. Galt: I move to strike that as not responsive, before he launches on his speech. I object to it.

Mr. Tuttle: I don't know about a speech. What is the question?

The Witness: That he indicated to me that the domestic—

Mr. Galt: I asked him if he knew what classification warehouse a foreign or imported liquor comes from.

[fol. 193] Judge Hays: Are you now explaining how you know, that you do know?

The Witness: That's right.

Judge Hays: Then the answer is that you know, but your knowledge is based on—and go ahead.

The Witness: That is so.

A. (Continuing) Mr. Cromach informed me that the bonded—that the warehouse—I did indicate a No. III warehouse. Now, I'm not sure of the No. III, but I presume that's what it was, and he said, "No, do not order until you hear from me." And at a later date he told me that I could go ahead and order the imported items.

Q. And that was from a Class III bonded warehouse; right?

A. I presume that's the number. I'm not sure.

Q. But it is not Class VI, these foreign bottles?

A. That's right.

Q. And what date did Mr. Cromach or whatever the gentleman's name was—what date did he tell you that, approximately?

A. Around the 9th of April. Approximately around the 9th of April.

Q. 1960?

[fol. 194] A. 1960.

Q. Before you started your operations, which I believe you said was the 13th or the 14th?

A. That's right.

Q. When did you draw the complaint in this action? When did you verify the complaint?

Mr. Tuttle: That shows on the face of it.

Q. (Continuing) The 22nd of July, 1960. And yet you verified statements in your complaint that you got your liquor from Class VI bonded warehouses; isn't that correct? Doesn't that appear in your complaint?

A. Yes; it did.

Q. Now, exclusively. Isn't that in your complaint?

A. Yes.

Q. Now, you claim, as I understand it—it has been emphasized by your counsel, but I ask you if it is your claim and your understanding that your operations are under the letter which, over my protest, was put in evidence, the letter that was attached to your complaint.

Mr. Galt: I don't know the Exhibit number.

The Clerk: Exhibit 3.

Mr. Galt: Thank you very much.

Q. (Continuing) Exhibit 3. You say your operations [fol. 195] are conducted under that, do you not?

A. Yes, sir. Yes, sir. I would say—

Q. You say you are familiar with that letter?

A. Yes.

Q. There is no date here, but that letter was in April of 1958; is that correct? It appears that way—or so, before you started your actual operations?

A. Correct.

Q. And am I correct when I say the only reference whatever in that letter is to Class VI bonded warehouses? Is that correct or is it not?

A. Yes, sir.

Q. We will show it to you. You can use your counsel's copy, which is cleaner than mine, I think.

Mr. Tuttle: I've got the complaint right here.

Mr. Galt: Let me show him the exhibit itself.

Q. (Continuing) I am showing you Plaintiff's Exhibit 3. Is there any reference there to any but a Class VI warehouse?

A. No.

Q. What is that? I don't—

A. No.

Q. And sixty per cent of your business is in imported liquors, according to your own calculation, which do not [fol. 196] come from or does not come from Class VI bonded warehouses; right?

A. Right, but may I say, I am not up to the rules and regulations of these warehouses. But No. VI bonded warehouse indicates manufacturing. Does that have any meaning on the—

Q. I am only trying to find out where you get your liquor and whether, as you claim, since your entire claim is premised—

Mr. Galt: As your Honors know from the repeated references made this morning, the claim is that the operation is under this Exhibit A. Sixty per cent of it already is obviously, by no possible method, under Exhibit A.

A. But obviously Mr. Pascal has a No. VI and a No. III.

Mr. Galt: I think the witness is being argumentative. I believe I have a right to cross-examine him without his volunteering any statements.

Judge Hays: Just answer the questions.

The Witness: I am sorry.

Q. Now, when the liquor, from whatever warehouse it is obtained by your supplier, be it Pascal or either of the other two you have mentioned, when that is taken from the [fol. 197] warehouse, I believe you testified that it was put on a truck as the form of conveyance, a bonded truck,

bonded carrier, and brought to your premises at Idlewild; is that your testimony?

A. That's right, sir.

Q. Now, that Form 7512— It is in evidence, I believe; I forget the exhibit number.

Mr. Galt: It is the large form.

The Clerk: Exhibit 9.

Q. (Continuing) Exhibit 9. You don't have anything to do with making out that form or signing it, do you? I will show you plaintiff's Exhibit 9 so that we will be clear as to what we are discussing.

A. No; I did not.

Q. Do you ever see those forms?

A. Yes.

Q. And when they are filled in, and not with Amex Warehouse, because we are disregarding that here; that is something else again— Did you ever notice that portion that says, "Final Foreign Destination", right here? (indicating) In this form it says Mexico.

A. Yes.

Q. And in this form, obviously, therefore, it is filled out and it is printed in even before anyone signs it, is that [fol. 198] correct, in this form, that is, Exhibit 9?

A. I don't believe I understand what you are saying, Mr. Galt.

Q. Here we have a form that you introduced in evidence, or your counsel did, Plaintiff's Exhibit 9.

A. Yes.

Judge Bonsal: I understand this form was not introduced for what is written on here. It is purely a question—

Mr. Galt: That's right. I am bringing out a point.

Judge Bonsal: My copy hasn't anything in "Foreign Destination".

Mr. Galt: While that part is not in evidence, there is printing here, and it is a point I wish to bring out. It is a crucial point, I think, to the accuracy of the plaintiff's allegation.

Q. Is it not a fact that when that form comes to you, long after it has been signed by the supplier, Lipschutz or

Pascal or whoever it may be, that point is left blank, even when these liquors are on your premises? Isn't that right?

A. Well, that I couldn't testify, because I don't know.

[fol. 199] Q. Are there any forms that you have here? We have been talking about this 7512. Right now this Exhibit 9 is just a piece of paper. You are supposed to know about its use. You have been testifying about it. Do you know whether that is filled in, that "Final Foreign Point of Destination"?

A. Well, sir, it would be quite difficult to indicate all the final foreign—

Q. Pardon?

A. It would be quite difficult to indicate in here all the final foreign destinations when we have people going down to Mexico, South America and different parts of—

Q. Obviously, when the shipper sends it to you, neither he nor you knows where the liquor will wind up, does he or you?

A. Well, nobody knows that, sir, even when they fabricate it.

Q. So to that extent the Form 7512 is not availed of; is that correct?

A. It's not what, sir?

Q. It is not availed of?

A. Well, explain that.

[fol. 200] Mr. Tuttle: I don't know what that question means. It is the Customs form, which he has nothing to do with, and it is the basic—everybody agrees to it that it is the basis of distribution.

Judge Hays: All I understand Mr. Galt to mean by it is that the form is not completely filled in because this is left blank.

Q. Here, for instance, is something which I have just got. Is this a form that has to do with your business?

A. Yes,

Q. Is that filled out in this form?

A. The destination?

Q. That's right. Final foreign destination.

A. No; it's not.

Q. There are a lot of other things left in blank. Now, it says here that you are the consignee, Idlewild Bon-Voyage Liquor Corp., doesn't it?

Mr. Tuttle: No; it does not.

Q. (Continuing) Well, look at it, Mr. Witness. You will have to testify, not your counsel. You look at it and take your time.

Mr. Tuttle: I will be glad to have the Court take Exhibit 9 and look in the lower corner—

[fol. 201] Judge Hays: He is not showing him Exhibit 9.

Mr. Galt: I am showing him a form in actual use, 7512.

Mr. Tuttle: I am asking the Court, in view of that question, to which I am objecting, because it is not in accordance with the form— In the lower left hand corner it says, "Delivered to the carrier named above for delivery to the Collector of Customs at Destination, sealed with Customs seals."

Q. (Continuing) Now, tell me if that portion is filled in.

Judge Hays: We overrule your objection.

Mr. Galt: Pardon me. The objection is overruled?

Q. (Continuing) Will you answer the question, Mr. Giliotti? Is that question filled in on the form?

A. It is not.

Mr. Galt: I beg the Court's indulgence for a moment.

Q. Now, you put another form in evidence—

Mr. Galt: I don't know the number.

Mr. Tuttle: We will help you.

Mr. Galt: Yes. Thank you, Mr. Tuttle. I believe that is the one.

[fol. 202] Mr. Tuttle: Wait until I get the Exhibit number. Here it is. The Exhibit is 10.

Mr. Galt: No, it is not. I beg the Court's pardon. I just want to clarify what I have in mind. I will have to skip that, because unfortunately my papers are not in such good order that I can find the one I have reference to.

Mr. Tuttle: Would you like to look at all of the exhibits? I have them in sequence here.

Mr. Galt: I appreciate the Court's desire to conclude as quickly as possible, and I am going to try to do my best so as not to extend this unduly and to stick as far as I can to things which may be relevant to the situation.

Q. (Continuing) Now, when this is trucked or conveyed by truck to your premises, you described that there was a seal on the doors, and I believe you said—and correct me if I am in error—that you were not certain whether these were Customs seals or not, but in any event, when it arrives at your premises, the truck with the liquor that you have ordered, when it arrives you said, I believe, in your testimony, that you and your people are there when the truck comes downstairs at the Arrivals Building; is that correct?

[fol. 203] A. That is right, sir.

Q. No Customs inspector is assigned to that, is he?

A. Customs inspectors are always around, sir.

Q. Did I ask you whether they are always around? I know that at Idlewild Airport I can find all the Customs inspectors I want.

A. Well, that's just it. I am operating actually in a police station.

Q. I asked you an entirely different question. I asked you if there is a Customs inspector assigned there.

A. The Customs men could be there at any time. They could observe from any place—

Judge Hays: Are there occasions—

The Witness: There are, sir.

Judge Hays: Are there occasions when there are some Customs inspectors present when the truck arrives?

The Witness: Well, let me say, to my knowledge there could be.

Q. To your knowledge, there could be?

A. Yes.

Q. Didn't you testify earlier this morning that you, [fol. 204] yourself, and your employee look at the shipment, and if there is anything wrong you initiate a request to Mr. Johnson, a Customs official?

A. That's right.

Q. So that means nobody is there except if he happens to be there on occasion, isn't that so? Nobody is assigned there?

A. Mr. Galt, it could be an entirely different Customs inspector who is assigned to watch that shipment come in.

Q. But is there anyone assigned to meet that truck when it comes in and to be with that liquor when it goes upstairs to your quarters?

A. We have had Customs inspectors down at the area when it was unloaded. We have Customs inspectors when it was brought into the area. We have had Customs inspectors observing our deliveries.

Mr. Galt: That is not responsive to my question. I move that it be stricken, if your Honors please. I think I have asked a fairly lucid, simple question, and I think the witness is intelligent enough to answer it.

Q. I asked you if there is a Customs inspector—I don't care whether it is Customs inspector X on one day, Y on [fol. 205] another day and Z on a third day. Is there a Customs inspector assigned officially to meet this delivery?

Mr. Tuttle: I object to this word "assigned". They are all there.

Mr. Galt: I asked him—

Judge Hays: I think that is the point; Mr. Tuttle. Mr. Giliotti does not know whether they are assigned or not. I take it that is what he is saying. He is saying they are there, not on all occasions, but frequently they are there. He doesn't know whether somebody sent them there or not.

The Witness: They could be plainclothesmen or anything.

Q. (Continuing) It could be I who is there. You wouldn't know if I am a Customs official or not?

Mr. Tuttle: I would put you on the stand if you were there.

Mr. Galt: Well, I wouldn't be there.

Q. (Continuing) The point is that there is no assignment of a Customs official.

Mr. Tuttle: That is something the witness would not know.

Mr. Galt: I wonder why, your Honor, the rules are [fol. 206] more rigid on cross-examination than on direct examination, when it should be the reverse. The witness was allowed to answer all sorts of questions. Surely he can answer this question.

Judge Hays: Go ahead with your examination.

A. In regard to assigning a man at the area, that I could not say, but there are Customs men around that vicinity at all times. Whether they are assigned there by the Customs collector or not, I do not know.

Q. Well, you are in the same building with Customs people. They are all over the place downstairs, aren't they?

Judge Dawson: Is that a question?

Mr. Galt: Yes; it is a question.

Mr. Tuttle: That I do not object to.

Judge Dawson: What is the question.

Q. (Continuing) The question is: Isn't it true that there are Customs officials? This is their place of operation, at the Arrivals Building?

A. Yes.

Q. That is one thing. You understand this difference between that and having men assigned to your operation, don't you?

Mr. Tuttle: I object to that as purely argumentative. [fol. 207] The man has made plain what his situation is.

Q. Now, when the liquors are brought up to your premises, what happens? Did I understand you to testify earlier that they are put into the compartment in back of the wall? Is that correct?

A. There is a section which is divided.

Q. A section?

A. And it's in the back of our sales counter, which is an exhibit here, and the stock is stored in that section of the—

Q. And when it comes upstairs, does a Customs man come upstairs with your man when it is delivered from the truck?

A. There are times when he comes right up with him, and there are times when he comes out.

Mr. Galt: I move to strike that as not responsive.

Judge Hays: Denied.

Mr. Tuttle: I think the question is fairly answered by that addition.

Judge Hays: The motion is denied.

Q. Now, at your place up at— What is it? 2321 or 21— What is the room number?

[fol. 208] A. 2123.

Q. Up at 2123 is there a Customs official assigned to stay at those premises at any time?

A. No.

Q. And when the liquor is brought up, it is brought in through the door, through the partition into that section where the liquor, you say, is stored?

A. That is right.

Q. Now, let us take that section. What is it made of? What is the material?

A. I believe it's two-by-two or two-by-four, with a mahogany veneer. The structures are approximately— The beams are approximately sixteen inches in between, and there's a door with a burglar—a Yale burglar alarm attached to the door.

Q. Have you got any poultry wire in there?

A. No poultry wire. It's a screen which is on the top of this—on top of the section to prevent—to let the flow of air conditioning through, but that's all.

Q. You are familiar with a regulation called—pertaining to Part 19 of the Federal Regulations, which is printed in the record, 19.1, Subdivision C?

Judge Dawson: What page in the record?

[fol. 209] Mr. Galt: Page 172-A, if the Court please.

Have you got that, Mr. Tuttle? I would like to show him your clean copy.

Judge Dawson: We don't have that.

Mr. Galt: Apparently, Mr. Tuttle and I have been using a different record than that with which the Court has been equipped. I did not realize that.

Judge Hays: Are we both considering the same case?

Mr. Galt: Yes, and, up to a point, the same record.

Mr. Tuttle: Up to this point we had been using the same record, but when I petitioned to the Supreme Court for a writ of certiorari and mandamus in an appendix, it contained more from the regulations than did the final transcript which by agreement went before the Supreme Court. I have that more extended appendix and hand it now to Mr. Galt.

Mr. Galt: I am a little embarrassed to say that we have made reference to pages in this record in our brief and opening memoranda which are not before the Court. I apologize. That was inadvertence on our part.

Q. Now, over here, you read this?

[fol. 210] Mr. Tuttle: By "this" will counsel please indicate for the record what he is referring to?

Mr. Galt: Page 172-A of the motion for leave to file a petition for mandamus in the Supreme Court of the United States and petition for writ of mandamus.

Mr. Tuttle: What is the question?

Q. (Continuing) Does your section have materials of the nature required there?

Mr. Tuttle: Let us see what the regulation refers to.

Mr. Galt: We have that in our memorandum, Mr. Tuttle. I believe you must have seen it.

Mr. Tuttle: Let me acquaint myself with that. I had not known what your objectives were up to this minute.

This, your Honors, is an extract from the regulations of the Bureau of Customs that he is referring to, which collection of regulations is headed "Customs Warehouses", and it is part of Class VI, as I understand it, bonded warehouses.

That would be the Lipschutz warehouse.

Mr. Galt: I submit, if your Honors please, that right in Appendix A attached to the complaint, whatever its exhibit number is—and I apologize for continually forget-[fol. 211] ting it, but the letter which has been the cause of so much dispute makes reference to re-warehousing.

It is quite true that this applies to a Class VI warehouse. The point of my question, if there is any dispute about it and Mr. Tuttle objects to it, is that this does not at all conform with that type of warehouse requirement.

Mr. Tuttle: He has been asked to describe what his premises are, what they are made of, and then counsel can argue whether or not a regulation concerning bonded warehouses such as Lipschutz had is applicable to his building.

Judge Bonsal: Mr. Tuttle, you will concede, will you not, that his premises do not conform to the regulations?

Mr. Tuttle: If there is anything about chicken wire, I will concede it in a minute.

Judge Bonsal: And if that is done, this has no application to his premises.

Mr. Tuttle: That is all there is to it.

Judge Bonsal: Can't we get rid of this?

Mr. Galt: There are other requirements, about admission without detection and so forth.

[fol. 212] Judge Bonsal: His premises are covered by this Warehouse VI regulation, and it is admitted as a fact that his premises do not meet those requirements, but the point is as to whether the requirements are applicable to his premises.

So we can leave it strictly to that question.

Mr. Tuttle: All these regulations are, of course, before the Court. They are official Government regulations.

Mr. Galt: As long as we are on that subject:

Q. You agree, do you not, that your premises do not constitute a Customs bonded warehouse? Is that conceded?

Mr. Galt: Will counsel concede that?

A. My—

Mr. Tuttle: The only thing that can be done with a question of that kind, which calls for a characterization, is to state the facts, and I object to the form of the question, unless the witness is to be permitted to state the facts.

Mr. Galt: Will the Court permit the witness to answer that question?

Judge Hays: You asked if counsel would admit it, and I take it that counsel does not admit it.

[fol. 213] Judge Dawson: To use Mr. Galt's phrase, that would call for a conclusion of law on the part of the witness, I guess.

Mr. Galt: Well, the witness has been giving vent to so many conclusions—

Mr. Tuttle: I object to any such statement as that, giving vent to anything.

Mr. Galt: I saw no harm to giving one more. I have been brought up on the supposition that cross-examination carries greater rights that direct.

However, I want to conserve the Court's valuable time. I think the situation is clear.

Q. Now, when the goods leaves your warehouse—

Mr. Galt: Pardon me. That characterization is one which by no stretch of the imagination will I give to your premises.

Q. When they leave your premises at 2123 or 2321, as the case may be, they are put, you testified in a carton which you sealed. You say you sealed that carton—your corporation?

A. My employees did, yes.

Q. And when that carton is brought to the plane—and that is where it goes from your premises, isn't that so?

[fol. 214] A. Right.

Q. —is there a Customs officer present when you make up the carton and seal it?

A. It could be.

Q. Could be?

A. Yes.

Q. And it couldn't be, too; right?

A. Yes.

Q. And when you have it sent to the plane, who takes it to the plane? One of your employees?

A. One of my employees.

Q. And does he take it in any kind of vehicle or by hand or how?

A. Well, we have numerous ways of taking it, because it all depends how many sales we have that he could carry. Hand cart and vehicles, depending on—

Q. On the number of cartons and the weight and so forth, I should imagine. Is that what you mean, Mr. Giliotti?

A. Right.

Q. He may carry it or put it on some kind of conveyance?

A. Hand cart.

Q. Hand cart. Is he accompanied to the plane by a [fol. 215] Customs official?

A. Well, not that I know of, but it could be.

Q. And it couldn't be, too, right, and not that you know of, in any event? Is that what you said?

A. With the exception that I have seen Customs men go aboard the airplane and that—

Q. We are not aboard the airplane as yet.

A. All right, sir.

Q. And when it is put on the plane, when it arrives, I think you said a half hour before the plane's scheduled departure—when it is put on the plane is the Customs official present?

A. Yes; I have seen them present.

Q. And you have seen when they are not present; is that right?

A. Well, I can't swear to that.

Q. Can you swear to the fact that a Customs officer is always present or usually present?

A. No; I can't.

Q. Now, when it gets on the plane, it is given to the purser; isn't that right?

A. Yes.

Q. And is there a Customs officer aboard the plane, unless he happens to be there as a traveller, by accident? I [fol. 216] mean, on official business. Is there a Customs officer aboard the plane?

A. Numerous times.

Q. While it is in flight?

A. You said, while the delivery is made.

Q. No. I am past that point.

A. I am sorry.

Q. Then I did not make myself clear. Let me make myself clear. Do you know whether there is a Customs officer

assigned to that flight to travel with the plane to the overseas destination of the plane?

A. Assigned to the flight?

Q. Yes.

A. I don't believe there is.

Q. So you don't know what actually happens to the liquor after that plane leaves; is that correct?

A. Well, the airlines have instructed their personnel—

Q. I didn't ask you what the airlines have instructed their personnel. I asked you if you know—

Judge Dawson: You mean, does he know of his own knowledge, or does he know by hearsay?

Mr. Galt: Does he know of his own knowledge?

Judge Dawson: Your question did not ask that.

[fol. 217] A. After the plane has taken off—

Q. For all you know, the liquor could be consumed on the plane, isn't that so?

Mr. Tuttle: I object to that question. The purser, acting for the airline, has signed a pledge not to deliver it until the passenger reaches his foreign destination, and we will have to assume, I think, unless the contrary appears, that that pledge is fulfilled.

Judge Hays: Let me put it to you this way:

You have no way of knowing that the liquor is not consumed on the plane, have you?

The Witness: Well, sir, I have been with Pan American for twenty years before I started this business, and I know for a fact that liquor control aboard the airplane is at the discretion of the Captain and the steward, the purser on board, and that liquor which is carried aboard the flight, even before the tax-free liquor shops started at Idlewild, was not to be used for consumption aboard the airplane. They have their own liquor, which they sell to the first class —I mean, give away to the first class passengers and sell to the economy passengers.

Q. Mr. Giliotti, in any event, isn't it true that there is no [fol. 218] accounting for the bottle on the other side? There is nothing in any of these papers and these forms, any of these things that we have here in Court today or

in your operation that in any way accounts for the bottle on the other side; isn't that so?

A. Well, Exhibit 13 is a paper which travels— I believe it's 13. The delivery receipt.

Mr. Tuttle: That's right.

A. (Continuing) —which travels with the aircraft and the purser, the copy of that delivery receipt. That indicates that—

Q. Do you get that back afterwards?

A. Which one, sir?

Q. After the flight is over, this one. What is this? Plaintiff's Exhibit 13. Do you get that back after the flight?

A. You are referring to the duplicate copy there?

Q. Well, any—

A. I get the original copy back from the purser, signed.

Q. By the purser?

A. By the purser.

Q. Not by the party by whom or for whom the liquor was purchased; is that right?

[fol. 219] A. That's right.

Judge Hays: And the purser signs this before the flight starts?

The Witness: That's right, sir.

Mr. Galt: That's right. That is what he said before in his testimony, unless I misunderstood it.

Q. Do you manufacture any liquors, yourself?

A. No.

Q. Now, suppose a passenger fails to notify you that he has changed his plans, fails to notify you an hour before that he has changed his plans, and he is not going on, let us say, Flight 802, TWA or Pan Am, as the case may be, the one for which the invoice has already been written out.

A. Yes—

Q. What happens to the bottle or bottles of liquor in that case?

A. Well, when that happens, unless— If he fails to notify us, the liquor is immediately exported overseas. We don't know exactly what happens to it when it gets there. I presume that it is put immediately into foreign bond and dis-

posed of after so many days—so many months. I have no idea.

[fol. 220] Q. Have there been any instances of such situations, where the passenger does not notify you in time to prevent the liquor from being put on the plane, in other words, one hour before the scheduled departure?

Judge Hays: How would he know? He just puts the liquor on the plane and off it goes. He doesn't know whether the passenger is there or not, does he?

Mr. Galt: Well, the passenger might claim it within one hour, which is too late, according to the slip which is in evidence as Exhibit—their invoice.

Mr. Tuttle: Exhibit 12. I have it here.

Mr. Galt: Exhibit 12. I am sorry. As referred to at the end of your exhibit, "No claim will be honored if passenger changes flight without notifying this office one hour prior to departure of the flight of original booking." That is Exhibit 12.

The Witness: Well, Mr. Galt, I don't know if you are familiar with passengers leaving the country. They have numerous things to do, and today we are in a jet age, where everything is done rapidly, and at one time where there used to be at least three hours at the airport, today it's approximately one hour. The reason for that is to emphasize to the passenger that he must advise us of the [fol. 221] change of aircraft if possible, and we would like him to get it to us as fast as possible, because—

Q. I am not quarreling with the rule you have. I am asking you, Mr. Giliotti, what the situation is. I am not saying whether the rule is reasonable or unreasonable. I am only asking what happens when such a thing does occur. Is a report made to Customs?

A. That the passenger—

Q. That the party for whom liquor was intended got off his plane, and the liquor could not possibly reach that party. Do you make such a report?

A. No; we don't.

Q. Now, let me ask you this: When you purchase your liquor, and you purchase it from Pascal, among others—

the supplier is immaterial. Let us say Pascal. When you purchase it, do you get an invoice of any kind from Pascal?

A. Yes; I do.

Q. Have you got a sample of such an invoice? I asked your counsel to produce that, and I think he agreed that he would. Maybe you have it with you.

A. I don't have Pascal, but I have—

Q. It doesn't matter. Another supplier will do, Mr. Giliotti.

[fol. 222] Mr. Galt: I fear I need to use my glasses. Would your Honors give me a moment?

Q. (Continuing) This is not one of the suppliers with whom you deal now?

A. He used to be, yes. I don't know.

Q. But at any rate, this, you say, more or less typifies the kind of invoice you get in general from your suppliers; is that what you say? Is it fairly representative of the kind of invoice you have from Pascal, from Connor, from Lipschutz, or from anyone with whom you dealt? You did deal with this fellow in November 1960, Samuel Meizel & Co., right?

A. Yes; that's correct.

Q. Now, doesn't it say on here after "Invoice", with an identifying number and the name of the company, Samuel Meizel & Co., and other things—doesn't it say, "Sold to Idlewild Bon-Voyage Liquor Company, Room 2123" et cetera "30 cases White Horse Scotch Whiskey", and giving an amount and so forth, and marked "Paid" by you with a check number; is that correct?

A. That's right. I paid for it.

Q. So you buy this liquor. There is a sale to you; is that correct?

[fol. 223] A. Yes, sir. I would like to see you get it free.

Q. That is Sale No. 1, and then the liquor gets to your premises, in this case the thirty cases of Scotch, imported whiskey. Now, when liquor arrives at your premises, do you buy —

Mr. Galt: Let me withdraw that.

Q. Do you buy in case lots as a rule, that is, more than one case of liquor at a time, that is, for instance, as on this order?

A. Yes; I do.

Q. And the liquor comes into your premises. How long can liquor stay in your premises before a particular bottle is sold, let us say, out of a shipment like this?

A. Well, it could be almost immediately. We could be out of the item, and it could arrive there, and we are ready to make sales.

Q. Well, even this one, which I took without ever having seen it before. There are thirty cases of White Horse Scotch Whiskey. You don't sell that in a day or two, those thirty cases, do you?

A. No.

Q. And it might be on your premises longer than a few days?

[fol. 224] A. Yes.

Q. And it stays on your premises until it is sold?

A. That's right. That's why we have—

Q. How long, to your knowledge, has liquor stayed on your premises until every bottle is sold out of the case?

A. Well, taking everything into consideration, the Scotch and bourbons, some of them have been there a period of, let us say, twenty days and thirty days.

Q. And even longer?

A. Well, I don't know about that.

Q. Would you say that liquor has not been on your premises, a particular bottle of liquor, longer than thirty days? Will you say that under oath?

A. Well, that I would have to look at the record of usage.

Q. So it might stay there longer than thirty days, might it not?

A. It might.

Q. Now—

A. But I have proof that it's been there—

Mr. Galt: I am on to the next question if your Honor please. I don't think the witness should be allowed to elaborate on an answer.

[fol. 225] Judge Hays: Go ahead with your examination.

Q. What is the number of bottles that you generally sell to a customer?

A. It all depends where the passenger goes. It must be a passenger.

Q. All right. It is a passenger. You mean to say that if I came into your premises and identified myself as Passenger So and So, with Flight No. So and So, you would not sell to me? You go through a process of investigation?

A. Providing you have a seat number.

Q. All right. If I come in with a seat number, you will fill out one of these invoices— What is it, Exhibit 3?

A. Yes. Well, Exhibit 12.

Q. Exhibit 12. I beg your pardon.

Well, now, Exhibit 12. You sell that whiskey or that liquor or that wine or whatever it may be—you sell it to him with the understanding, you say, that it would be delivered when he reaches his destination?

Mr. Tuttle: Don't just shake your head. Say yes or no.

A. Yes.

Q. And you get paid for it then and there; is that correct?

[fol. 226] A. I do, sir.

Q. In fact, you won't make up the shipment unless it is paid for; is that correct?

A. That is correct, sir.

Q. And the same thing happens at the two counters that you are at now: TWA and Pan American, isn't that so?

A. That's right.

Q. By the way, you are on leave of absence from Pan Am; isn't that right?

A. That's right.

Q. What was your capacity there?

A. When I left Pan American I had the title of Commissary Supervisor, No. 1.

Q. And aren't you still on leave of absence from that?

A. Not from that title, no. How can—

Q. Aren't you on leave of absence from Pan Am at the moment?

A. I am on leave of absence, yes.

Q. Didn't you get an extension just a few days ago?

A. I did, but not as a Commissary Supervisor, No. 1. [fol. 227] I would have to take whatever job is available when I would go back.

Q. Well, I am not interested in the so-called—

A. Well, you are interested in my title.

Q. I am not interested in the Civil Service aspects or categories. I am interested in Pan Am.

A. I'm not with Pan Am.

Q. You have a leave of absence?

A. Yes.

Q. You can go back to Pan Am, provided there is a job available?

Mr. Tuttle: And provided you are thrown out of here.

Q. (Continuing) I can go to Pan Am if there is a job available, but you can go to Pan Am—

A. They would give me first preference.

Q. Do you still carry an honorary union card?

Mr. Tuttle: What has that to do with it?

Judge Hays: I can't see any harm from it.

A. I have stated to you before that I did.

Q. And you were a member of the local TWU union at one time while you were actually working with Pan Am; isn't that so?

A. Not in a supervisory category.

[fol. 228] Q. What are the number of sales that you make, on the average, to each passenger that comes into your place, or someone that comes in and identifies himself to your satisfaction as a passenger? What is the average number of bottles per passenger?

A. Providing where he goes. There are different—

Judge Hays: What is the overall average?

Mr. Galt: That is what I meant.

A. Well, we will say roughly two.

Q. Roughly two?

A. Roughly two.

Q. Doesn't your complaint say that you sell as a rule one bottle per passenger? Isn't that right in your complaint, the one you verified?

Mr. Galt: I will take a moment to find it, but I believe it is there.

A. At that time I did, Mr. Galt, but at that time I did not have the rules and regulations set forth by Customs.

Q. "Average sales consist of one to a passenger"?

A. That's right.

Q. How many bottles on the average—

Mr. Tuttle: I believe he is entitled to explain.

[fol. 229] Judge Hays: Let him explain.

Mr. Galt: I did not mean to cut the witness off. I apologize, Mr. Tuttle.

A. At that time, rules were set by me that one bottle per passenger was all until we received the rules and regulations set forth by Customs officials in different countries.

Judge Hays: In other words, in 1960, you really were only selling one bottle per passenger; is that right?

The Witness: We started with that, sir, until we received notifications.

Q. Well, doesn't it say "Average sales"? Didn't it even then mean that there were sales of more than one bottle per passenger?

Mr. Tuttle: It does, but—

Mr. Galt: Let the witness answer.

Judge Dawson: It speaks for itself.

Mr. Tuttle: The complaint is before the Court.

The Witness: What?

Mr. Tuttle: Never mind. I am addressing the Court.

[fol. 230] Judge Dawson: The document is before the Court.

Q. Now, on the average, how many bottles per day do you sell? Of liquor, of course.

A. Well, it varies. It could be three hundred, four hundred, seven hundred, depending on the passengers that are interested in purchasing liquor.

Q. Seven hundred bottles per day?

A. Yes, sir.

Q. So there would be more than seven hundred bottles per day? Does it ever reach that?

A. Well, I think the highest was— I'm not exact, but I believe it was 735.

Q. Well, do you know: You have been in the airline business. Do you know how many people go overseas on the average per day from Idlewild?

A. Well, we have roughly, during the peak periods, where I indicated 735—

Q. Not peak periods. On the average.

Mr. Tuttle: The question is, what was the largest amount. You are telling what the peak was.

Judge Hays: No. That was not the question. The question is, how many is the average per day.

A. Well, I would say it's difficult to actually state how [fol. 231] many, but it's an average of eighty flights per day or better, with 120, 160 passengers aboard the airplane. But the passenger load—

Q. Are the airplanes filled? I thought the airplane companies were complaining—and I think you know this more expertly than I do—that they have to leave with partially filled planes and are asking to have the planes go less frequently. Are they usually filled?

A. Sir, I do not know the passenger loads aboard an aircraft.

Q. Now, do you have any license—and when I say "you", of course, I mean the corporation. We understand that throughout this examination. Does your corporation have any license from any governmental agency?

Mr. Tuttle: I put one in evidence.

Mr. Galt: A license?

Mr. Tuttle: Exhibit 3.

Mr. Galt: Of course, I not only do not concede that

Exhibit 3 is a license of any sort—but I will simply, for the sake of the argument, pass that by.

Q. (Continuing) I don't consider that a license. Do you have a license other than what you claim to be your license, [fol. 232] Exhibit 3? Do you have any license from any governmental agency?

A. We have in our area, outside of that exhibit, we have a Federal stamp, which it's a business stamp, which we pay $54, $56 for per year.

Q. And is that a license to conduct this kind of business?

A. You asked me, a government license.

Q. You know, you can't even tell me what kind of a stamp it is.

A. It's a Federal stamp, a tax stamp.

Q. Well, there are all kinds of Federal stamps. Have you got any license? Does your corporation have any license?

Judge Hays: Do you mean that you pay $54 or $56 a year for the privilege of engaging in this business?

The Witness: No, sir. It's a special tax stamp which all businesses must carry in the place of business.

Q. It is not peculiar to the liquor business?

A. No.

Q. Do you have any permit from any government official unit or agency?

A. All we have is that letter from Mr. Strubinger, the [fol. 233] Customs—

Q. Now, when you get imported liquors, as you say you do at your own estimate in sixty per cent of the stock in trade that you deal with— When you get that, do you file any application for a bond? I am talking now about foreign liquors. Do you file any application for a bond?

A. I would ask Pascal, Lipschutz. Customs bonded warehouses out of New York State carry a bond for these—

Q. I didn't ask about Pascal or anybody else. I asked about you. When I say "you", I mean Idlewild Bon-Voyage Liquor Corp.

A. We are responsible for—

Judge Dawson: He answered that question, that they carry no government bonds.

Judge Hays: Yes; he has answered it.

Q. Did you ever hear of a Form 7555?

A. No.

Judge Hays: Is your answer "no"?

The Witness: No.

Q. Did you ever hear of Section 1557 of the Tariff Act—I am sorry—19 U. S. C., Section 1557?

A. No.

Judge Dawson: I am a little puzzled about what you do [fol. 234] with this foreign liquor that you import. Do you buy it directly from the foreign exporter, or do you buy it from Lipschutz?

The Witness: I buy it from Lipschutz.

Judge Dawson: You buy it from the American bonded warehouses?

The Witness: That's right, sir.

Judge Dawson: And they are the ones who buy it from the bonded warehouse?

The Witness: That's right. It comes in.

Mr. Galt: Your Honors are in a position—somehow we will have to supply your Honors with a full record, but this is the record as we understood it to be, and we quoted it in our brief, and to make sure that the Court does not lose it in the shuffle for not having it in the brief, I would like to show Your Honors that when I referred to 7555, I was not taking something out of the air. That is the regulation appearing in our brief.

Here is the Federal Code of Regulations, 19.15, Subdivision G, and it appears at pages 183-A and 184-A of the record, and I want your Honors to observe that under that—of course, if your Honors wish to see it now, I have it here.

[fol. 235] Judge Hays: Can you provide us with copies?

Mr. Galt: We will manage to do so. I just wanted to be sure that it would be before the Court, if your Honors please.

May we have a moment to make a note that we are to supply your Honors with that?

Judge Hays: Surely.

Q. I believe you have told me already, and I don't mean to be repetitious, but I want to make sure:

You told us, did you not, that the foreign liquors are not labeled "For Export Only"; is that correct? You have told us that already, haven't you?

A. Yes.

Judge Dawson: As far as I can understand from the witness, there is no difference between the foreign liquor and the domestic liquor, except the absence of that label; he buys them from the same warehouses; they are delivered on the same form of papers, and everything is exactly the same, except they do not bear the label "For Export".

The Witness: That's right.

Mr. Galt: Then all my suggestions in opening argument and all my questions seem to have been to no avail. I say there is a world of difference.

[fol. 236] Judge Dawson: I didn't say I understand that from you. I said, from the witness' testimony.

Mr. Galt: From the witness' testimony, too. He said these do not come from Class VI warehouses. He said they do not come from Class VI warehouses.

Judge Dawson: Mr. Galt, if you had listened to what I said, you would not make a statement like that. I said the witness said, there is no difference between the foreign and domestic liquors; they come from the same warehouses. Pay attention, and you won't get into those by-passes.

Mr. Galt: I certainly do not wish to offend your Honor—

Judge Dawson: You are not offending me, but you are not doing justice to your client.

Mr. Galt: I beg your Honor's pardon if I in any way incensed you. I understood the witness' testimony to be different from that.

Judge Hays: Can a single warehouse be both a Class III and a Class VI warehouse?

The Witness: I believe it can.

Judge Hays: So that Lipschutz sells both domestic and foreign liquor; is that right?

The Witness: That's right.

[fol. 237] Q. Do you know whether Lipschutz or Pascal or any other supplier who sells you foreign liquors as well as domestic liquors— They all sell you both, don't they?

A. Yes, sir.

Q. Do you know whether they get them all from the same warehouse?

A. Who gets them from the same warehouse?

Q. The supplier, Pascal, or whatever his name is.

A. I don't know how they get them to their warehouse, except that the foreign commodity must be imported; the domestic is here in the United States. How they get it to this warehouse I don't know. I'm not able to explain that, the method that is used.

Q. Now, Mr. Giliotti, virtually all the airlines, if not all the airlines, at Idlewild Airport have passengers who purchase your liquor; is that so? Would you say it is true that every airline at the airport that goes overseas has had passengers who purchase liquors from you?

A. Going overseas, yes.

Q. I am talking only about overseas flights. Do you have any agreement with them to carry this liquor?

[fol. 238] A. Mr. Galt, this is an additional passenger service which is extended to their passengers.

Judge Hays: Your answer is that you have no such agreement?

The Witness: Yes, I have, sir. I was given approval by the airlines to go ahead and render this service to their passengers.

Q. Written approval?

A. I have the written approval. In fact, I believe I have one there from Pan American World Airways, indicating that they want this service, and that is the reason why we were able to get a three-way lease with the Port Authority and the airlines, because they wanted this service.

Q. Have you any approval in writing or agreement in writing for the procedure which you described here today, for the carrying of this liquor for the passengers who purchase it?

Judge Hays: From the airlines?

Mr. Galt: From the airlines.

A. There is—

Mr. Tuttle: I put in evidence two three-way agreements with two of the biggest airlines: Pan American and the other one.

[fol. 239] Judge Bonsal: These are for the counters.

Mr. Tuttle: For the counters; yes, sir, because those counters are in their buildings.

Judge Bonsal: Yes.

Q. (Continuing) That is for the privilege of having a counter and selling there, and a rental is paid for that, and it is only two airlines; is that correct?

A. Just two airlines, which I have my own counter at.

Q. Do you pay the airlines for the weight of the liquor that is carried on the plane?

A. No, sir. This is, as I said before, an additional passenger service which is extended to the airlines—to their foreigners going back to Europe, as the Americans have coming from Europe into the United States.

Q. Well, irrespective of the kind of service it may be or may not be, do you pay for that?

A. I pay only for the rental of the counter and a percentage for each sale.

Q. I am not talking about the counters at all, and I think you know that, Mr. Giliotti.

Mr. Tuttle: We don't have to have any such observation.

[fol. 240] Q. (Continuing) I am talking about the weight of the liquors that is put on the planes.

A. No; I do not.

Mr. Tuttle: If your Honors please, he asked whether there is any agreement with the airlines. My associate, Mr. Kelly, has produced a carbon copy of a letter that is addressed by the traffic manager of— I think it is Pan Am, which covers this precisely, dated January 10, 1958.

In view of the question, it may be that the witness will want to refresh his recollection about the existence of that paper, in addition to the leases that are in evidence.

Mr. Galt: If your Honors please, those exhibits that are in evidence certainly can speak for themselves, and I

think the witness can speak and should speak for himself. I believe he has answered the question, and this is argumentative.

Judge Hays: All right. You may proceed.

Q. Do you of your own knowledge know that a Class III—

Mr. Galt: Let me withdraw that.

Q. Do you agree that a Class III bonded warehouse is a public bonded warehouse used exclusively for the storage [fol. 241] of imported merchandise?

A. Mr. Galt, as I said before, I was not sure of the No. III warehouse, whether or not it was referred to me as a No. III warehouse.

Q. The warehouses that you purchase from are all outside the State of New York, aren't they?

A. They are, sir.

Q. Or the suppliers are outside the State of New York, too, aren't they?

A. Yes.

Q. Do you know whether any of them, Pascal, Connor, Lipschutz, is licensed by the State of New York?

A. I don't think— These are out of New York State. I don't believe they are.

Judge Hays: Do you hear that warning bell?

Mr. Galt: Yes, your Honor, and I am going to take it very much into consideration. I promised your Honors that I would not extend this unduly, and I think that I will be finished in a few moments, if I may.

Q. Are you a stockholder in this corporation, Mr. Giliotti?

A. I am.

Q. Are you a director?

A. Yes.

[fol. 242] Mr. Tuttle: Don't just nod your head. The stenographer does not get it.

Q. Are there other stockholders and directors of the corporation?

A. Well, there are other directors, yes.

Q. How much of the stock do you own?

A. Fifty per cent.

Q. And who owns the other fifty per cent?

Mr. Tuttle: I object to that. This is a question in the—

Judge Hays: What is the relevancy?

Mr. Galt: This should be routine. Well, the relevancy is this— Perhaps this question will clarify it, then.

Q. Are any of the other stockholders or the other stockholders, whatever it may be, in your corporation connected with any of the companies operating like Amex, whose form you showed me here before, or the one in Boston or any one of those places?

A. No.

Q. Well, let us have the names of the other stockholders.

Judge Hays: I would still like to know what the relevancy of it is.

[fol. 243] Q. Are any of them distillers, or are they in any way engaged in the liquor business other than—

Judge Hays: Is it contrary to New York law for distillers to engage in retailing? Is that your point?

Mr. Galt: I would certainly think this would be contrary to New York law.

Judge Hays: All right. Then we will permit the question.

A. No.

Mr. Galt: I will heed your Honor's admonition, and with that, it is your witness again, Mr. Tuttle.

Mr. Tuttle: I have but one question.

Redirect examination.

By Mr. Tuttle:

Q. You were asked about agreements that you might have with Pan American as to what should be done in connection with liquor put on the plane.

A. Right.

Q. I show you a letter dated January 10, 1958, from

Pan American to Idlewild Bon-Voyage. Did you receive that letter?

A. I did.

Q. This is a carbon copy of the original?

A. This is a carbon of the original, which was sent to me.

[fol. 244] OFFER IN EVIDENCE

Mr. Tuttle: Yes. I will offer that. I show it to Mr. Galt and offer it in evidence.

Mr. Galt: I beg your Honors' pardon a moment. I will not object to its admission.

(Received in evidence and marked Plaintiff's Exhibit 15.)

Mr. Tuttle: I have no copies for the Court, but you might hand it up if any of the judges want to see it. I have no further questions.

Judge Hays: Have you any further witnesses, Mr. Tuttle?

Mr. Tuttle: Sir?

Judge Hays: Do you have any further witnesses?

Mr. Tuttle: No. I have no further witnesses.

Mr. Galt: May I ask the witness one question about this letter, if I may, as soon as Judge Dawson is finished, and one further question.

Judge Dawson: Would you give the letter back to Mr. Galt.

Recross examination.

By Mr. Galt:

Q. This is from Pan Am, this letter that you have been [fol. 245] referring to, Plaintiff's Exhibit 15?

A. Right, sir.

Q. That is the outfit from which you are on a leave of absence?

A. That's right.

Q. Have you letters from any other companies?

A. I believe I do.

Q. Are they here?

A. I don't know if I have them here or not. I know I don't have them in here—but I—

Mr. Tuttle: Mr. Kelly has shown me one from the Trans-Canada Airlines. Here is one from the British Overseas Air Corporation, and here is one from— Well, isn't that enough, Mr. Galt?

Judge Hays: Have you now completed with this witness?

Mr. Galt: Just one or two more questions, and I will be finished.

Q. The approval you say you got of the plans: Was that in writing?

Mr. Galt: Do you have that exhibit?

Q. (Continuing) I am referring, in case you don't recall, to your Exhibit 4.

Is there any written approval? Did you get any written [fol. 246] approval of that?

A. I received an O.K. from Mr. Burton's office.

Q. Written?

A. No, but— A written— There's no doubt in my mind that a memo was written at that time advising the Deputy Collector of Customs here in New York of the—of our area and approved method of operating.

Q. Will you say under oath that you received a written approval of these plans?

A. No; I can't say that.

Mr. Galt: No more questions.

Judge Hays: All right. You may step down, Mr. Giliotti.

(Witness excused.)

Mr. Tuttle: I rest, your Honors.

I renew the motions which were made before, which your Honors took under advisement, and I assume you still have them there.

Judge Hays: Same ruling.

Motion to Dismiss Complaint

Mr. Galt: Your Honors, may I at this time move to dismiss the complaint for failure to make out a prima facie case, and in support of that motion may I be heard either

now or, if the Court wishes, at such time as we argue the case in full, unless the Court is disposed to grant the [fol. 247] motion now. May I outline the grounds?

Judge Hays: We will take the motion under advisement now.

Mr. Galt: May I ask Mr. Tuttle to examine the two letters which I intend to offer in evidence?

May I have the Court's indulgence for a moment, please? This may short-circuit a lot of additional effort and time.

Mr. Tuttle: Your Honors, I know nothing about these letters. They are rather extended. There is correspondence attached to them, and it would be pretty difficult for me to digest them in this moment.

I was wondering whether Mr. Galt would have something else he could go on with so he could give me an opportunity to see these. I have never seen them.

Mr. Galt: May I say this to your Honors: I have great respect for Mr. Tuttle's wishes, and I certainly do not want to hurry him, but I would like to say to the Court that these are letters of the Customs Department among Customs people. The plaintiff introduced Appendix A or Plaintiff's Exhibit 3 over our bitter protest about that, but here are the people that they are dealing with.

[fol. 248] Judge Hays: Mr. Tuttle has not made any objection to the introduction of these letters. He has just asked for a little time to look into them.

Mr. Galt: May I suggest this: I don't want to rush him. We have to argue, at any rate, and I don't believe the argument can be had within the few minutes that are left under the Court's admonition. There are about ten to fifteen minutes left. Maybe we could let Mr. Tuttle look at them.

Judge Dawson: Do you have any live witnesses?

Mr. Galt: It depends on what Mr. Tuttle's answer will be. We would like to cut this short, and it depends on what he says.

Judge Hays: The Court will recess for five minutes.

(Short recess.)

Mr. Galt: If the Court please, although Mr. Tuttle is not unwilling to allow what we wish to be put in evidence to be put in evidence—

Mr. Tuttle: No. That is not my statement.

Mr. Galt: If I am incorrect, Mr. Tuttle—

Mr. Tuttle: You are.

Mr. Galt: —you can modify it. My understanding of what Mr. Tuttle just said—and I hope we will be in agree-
[fol. 249] ment, is that as to that portion of the letter that we wish to put in, Mr. Tuttle is unwilling to have us put in unless we also put in evidence attachments to the two letters which we don't wish to put in.

Under those circumstances, since we do not wish to put those in, and since Mr. Tuttle is unwilling to have the Court see these unmarked, we do not press our offer. We do not wish to have a quibble about this, Mr. Tuttle and I, and I do not wish to waste the Court's time.

It is my view that they have not made out a prima facie case, and I will not insist over Mr. Tuttle's objection as to the methods of procedure. I will not put these letters in.

Judge Hays: Are you withdrawing your offer?

Mr. Galt: It is Mr. Tuttle's position—

Mr. Tuttle: I don't believe I have to explain it or justify it. I am just sitting down.

Mr. Galt: I just want the Court to know why I am not pressing the offer of these exhibits in evidence.

Judge Hays: Does that conclude your presentation, Mr. Galt?

[fol. 250] Mr. Galt: If your Honor please, it does.

Judge Hays: Both sides rest?

Mr. Galt: Yes, sir.

Mr. Tuttle: Yes, sir.

Judge Hays: The Court has indicated that it does not wish to hear oral argument on this but will given an opportunity for presentation of further briefs.

Mr. Tuttle: Your Honor said briefs?

Mr. Hays: Briefs. That is your choice, if you wish to present briefs.

Mr. Tuttle: Oh, briefs would suit me.

Mr. Galt: If your Honors please, this being an equity action and an action for declaratory judgment, may we have the record note that we move for judgment in favor of the defendants?

Judge Hays: The record will so note.

Mr. Tuttle: I have moved—

Judge Dawson: You have moved to the contrary.

Mr. Galt: Do I understand that we will not have any opportunity for oral argument, your Honor?

Judge Hays: That is correct. We do not wish to hear oral argument, but we will give you an opportunity to file further briefs.

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[fol. 252] Court Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 253]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF EXHIBIT No. 1

(Emblem)

STATE OF NEW YORK

EXECUTIVE DEPARTMENT

DIVISION OF ALCOHOLIC BEVERAGE CONTROL

STATE LIQUOR AUTHORITY

270 BROADWAY
NEW YORK 7

IN REPLYING REFER TO
√ SOLICITOR GENERAL

April 22, 1960

Hon. Louis J. Lefkowitz
Attorney General of the State of New York
The Capitol
Albany, New York

Dear Sir:

Idlewild Bon Voyage Liquor Corporation is a New York corporation and lessee under lease from the Port of New York Authority of space 16 feet wide and 30 feet, 4 inches in depth on the second floor of the new Arrivals Building at New York International Airport (Idlewild) which it proposes to use in the following manner.

[Stamp—Mrs. Toch, 106 APR 25 60, Received Dept. of Law √]

The front portion of the space will be used as an office where orders for liquor for a passenger departing by plane from the United States will be received from the public and payment made therefor.

The liquor so ordered and paid for will be shipped from the United States on the plane on which the passenger departs for delivery to the passenger at the foreign destination of the passenger. Shipment will be made on documents approved for export by the federal government and the airline will make the delivery to the passenger at the foreign destination.

The Bureau of Customs has indicated that delivery to the passenger as described is an export of the merchandise involved within the meaning of Section 311, Tariff Act of 1930 (see letter attached).

The rear portion of the space will be used for storage and display of the liquor (purchased by the corporation from suppliers from stock held by the suppliers in bond) and according to the corporation will remain under bond and under supervision of the Bureau of Customs.

Your opinion is solicited respectfully as to (1) whether the above described operation involves a sale of alcoholic [fol. 254] beverages within this State under the Alcoholic Beverage Control Law with particular reference to the provisions of subdivision 1 of Section 100 and subdivision 28 of Section 3 of the Alcoholic Beverage Control Law; (2) if so, what is the appropriate license therefor required by the Alcoholic Beverage Control Law to render such sales legal in this State under the provisions of subdivision 1 of Section 100 of the Alcoholic Beverage Control Law; (3) if no sale is involved, whether the provisions of Section 96 of the Alcoholic Beverage Control Law are applicable.

Very truly yours,

/s/ Hyman Amsel

Hyman Amsel
Counsel

[fol. 255]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF EXHIBIT No. 2

(Emblem)

STATE OF NEW YORK

EXECUTIVE DEPARTMENT

DIVISION OF ALCOHOLIC BEVERAGE CONTROL

STATE LIQUOR AUTHORITY

270 BROADWAY
NEW YORK 7

IN REPLYING REFER TO

May 9, 1960

Hon. Louis J. Lefkowitz
Attorney General of the State of New York
The Capitol
Albany, New York

Re: Idlewild Bon Voyage Liquor Corp.

Att: Hon, Ruth Kessler Toch,
Asst. Solicitor General

Dear Sir:

This is by way of supplementing my letter to you under date of April 22, 1960, and in response to a request for further information transmitted by Mrs. Toch of your office by telephone.

This office takes the position that the operation described in our letter of April 22, 1960 involves the sale of alcoholic beverages within this State under the Alcoholic Beverage Control Law with particular reference to the provisions of subdivision 1 of Section 100 and subdivision 28 of Section 3 thereof.

Further this office takes the position that the Legislature has not provided any appropriate license therefor and accordingly such sale would be illegal under the provi-

[Stamp—MAY 10 1960, Department of Law, Albany Office —MRS. TOCH.]

sions of subdivision 1 of Section 100 of the Alcoholic Beverage Control Law.

These positions rest upon construction of the relevant statutory provisions including Articles 5 and 8 and Section 99-b of the Alcoholic Beverage Control Law.

However, as to the applicability of the provisions of the Alcoholic Beverage Control Law to the traffic in alcoholic beverages having a situs actually or constructively without the State and not intended for use or delivery within the State there is some doubt, arising out of 1935 *Atty. Gen.* 139; *During* v. *Valente*, 267 App. Div. 383 and *Rosenblum* v. *Frankel*, 279 App. Div. 66 leave to appeal denied 279 App. Div. 1020.

[fol. 256] The import of the 1935 opinion of the Attorney General is of course, in this context, a question to be resolved by your office but we note that at least in part its continued validity is open to question by reason of Chapter 170 of the Laws of 1944 amending subdivision 1 of Section 3 of the Alcoholic Beverage Control Law to include within the definition of "alcoholic beverage" any "warehouse receipt, certificate, contract, or other document pertaining thereto."

As to the cases cited, this office has not regarded them as controlling since they do not represent expressions of opinion by the Court of Appeals; are distinguishable on their facts; involve contexts, i.e., commercial litigation, not directly involved herein; and in any event turn squarely on the decision in *Matter of Gulf Oil Corp.* v. *McGoldrick*, 256 App. Div. 207 affd. 281 New York 647 affd. 309 U.S. 414, which decision dealt solely with an attempt by local authority to impose a *tax* on goods in foreign commerce specifically exempted from such a levy by Act of Congress as is clear from the opinion of the U.S. Supreme Court. As to the last point, then, this office regards *During* and *Rosenblum* as involving misconstructions of the import of *Gulf Oil* which did not purport to deal with the question of *regulation* by the State, in exercise of its police powers of a traffic directly affecting the health, welfare and safety of its people (cf. *Alcoholic Beverage Control Law*, Sec. 2).

The above constitutes the sum of our position on the matter and the fruit of our research, and we add that the questions presented by us for opinion are of considerable significance beyond the immediate fact situation involved since, as is evident, they involve basically questions directly concerned with the jurisdiction of the State of New York over activities within its borders.

I trust that the above is sufficiently responsive to your request for further information.

Very truly yours,

/s/ HYMAN AMSEL
Hyman Amsel
Counsel

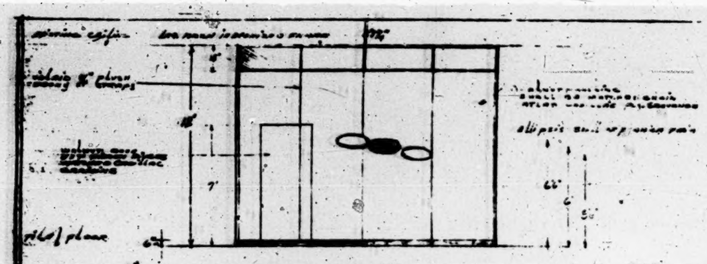
[fol. 257]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

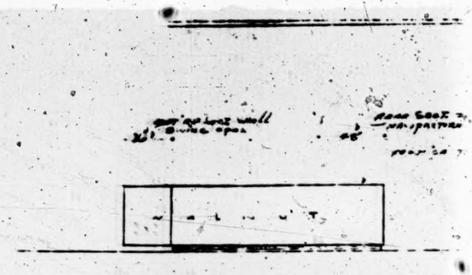
PLAINTIFF EXHIBIT No. 3

CLERK'S NOTE:

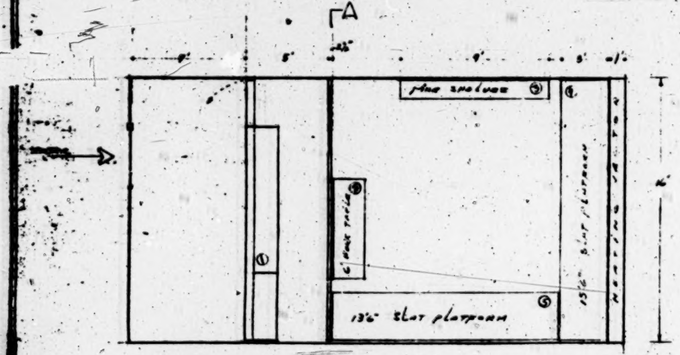
Plaintiff's Exhibit No. 3 omitted from the record here. It appears on printed page 12, side folio 18 supra.



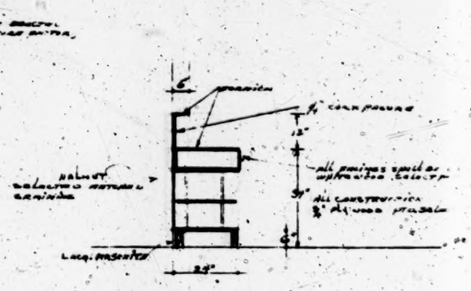
ELEV. A



ELEV. C

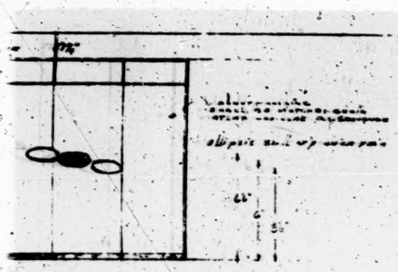


FLOOR PLAN

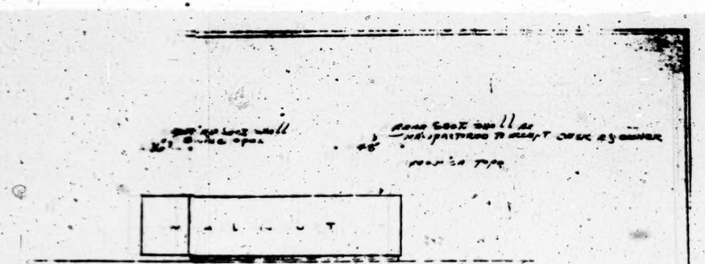


DET. D

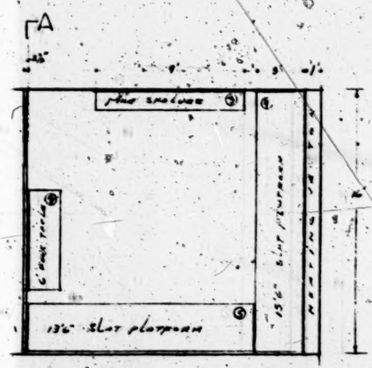
NOTE
SLOT PLAYROOM WALL
SHALL BE FINISHED AS BLANK
IF NOT ALREADY SO.
ALL EXPOSED EDGES OF WOOD SHALL
BE CHAMFERED TO ELLIPSES PASSING



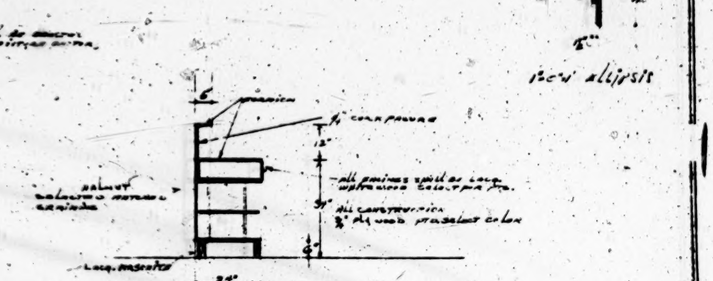
A



ELEV. C



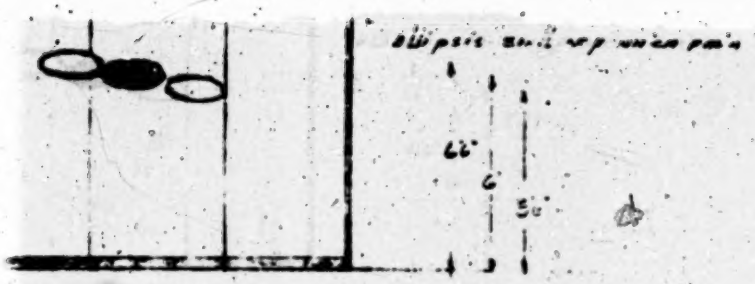
PLAN



DET. D

NOTE
SLOT PLAYROOM WALL
SHALL BE FINISHED AS BLANK
IF NOT ALREADY SO.
ALL EXPOSED EDGES OF WOOD SHALL
BE CHAMFERED TO ELLIPSES PASSING

plan
elevations
details
scale



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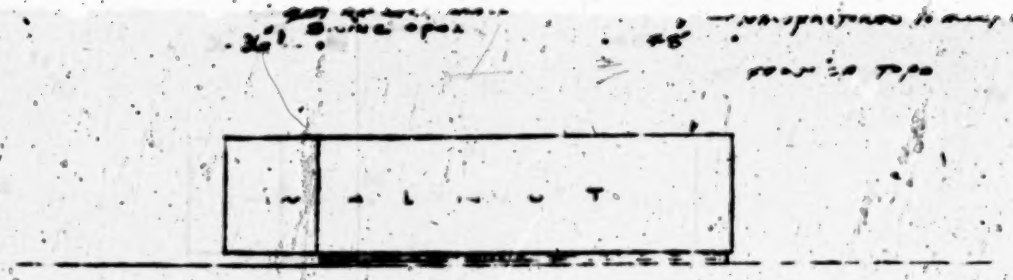
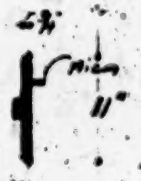
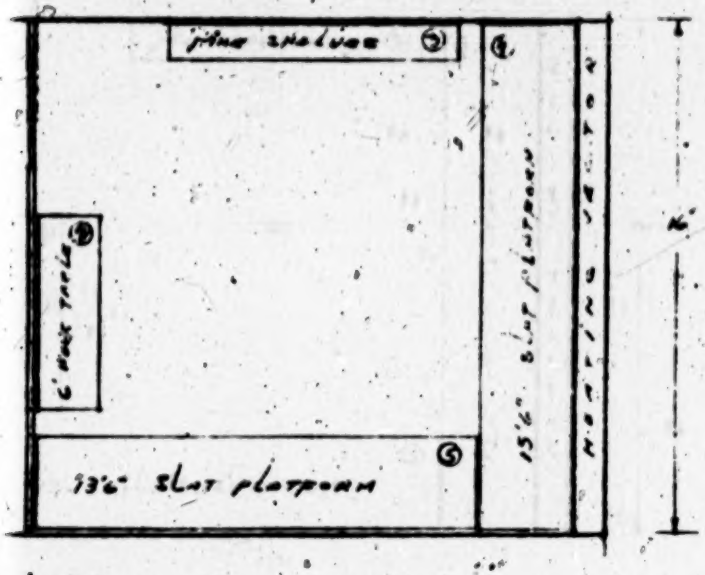


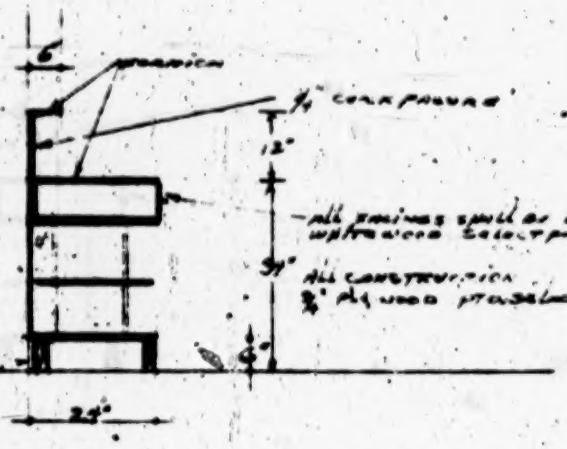
ELEV. ①



12"w ellipsis



LA
PLAN



DET. ①

NOTE:
SLAT PLATFORM SHALL HAVE 6" CLEAR BACK SLATS SHALL BE 1" DEEP

THESE SHALL BE PROVIDED AS BLANK 3" SCRIPT LETTERS FOR WINE & LIQUOR FROM "HITTEN" LETTERS AS LETTERS SHALL BE CONCENTED TO ELLIPSES PASSIVE

Blumer Store Fixtures Inc.
New York City
CA. 6-7754

jolawilo
wine & liquors

plan plan
elevations
details
scale

[fol. 259]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF EXHIBIT No. 5

Lease No. L-CY-17

THE PORT OF NEW YORK AUTHORITY TERMINAL

STORE AND CONCESSION LEASE

AGREEMENT OF LEASE

between

THE PORT OF NEW YORK AUTHORITY

and

IDLEWILD BON VOYAGE LIQUOR CORPORATION

Dated as of: October 31, 1956.

[fol. 260] THIS AGREEMENT, made as of the 31st day of October, 1956, by and between THE PORT OF NEW YORK AUTHORITY (hereinafter called the "Port Authority"), a body corporate and politic, created by Compact between the States of New York and New Jersey, with the consent of the Congress of the United States of America, and having an office at 111 Eighth Avenue, in the Borough of Manhattan, City, County and State of New York, and IDLEWILD BON VOYAGE LIQUOR CORPORATION (hereinafter called the "Lessee"), a corporation organized and existing under the laws of the State of New York, whose address is 23-19 33rd Road, Astoria, New York, whose representative is Henry Mulder.

WITNESSETH THAT:

The Port Authority and the Lessee, for and in consideration of the rents, covenants and agreements hereinafter contained, mutually covenant and agree as follows:

SECTION 1. *Letting*

The Port Authority hereby lets to the Lessee and the Lessee hereby hires and takes from the Port Authority, at New York International Airport on the second floor of the International Arrivals Building, the space as shown in diagonal hatching on the sketch annexed hereto, made a part hereof and marked "Exhibit A", together with the fixtures, improvements and other property of the Port Authority located or to be located therein or thereon, all said space(s), fixtures, improvements and other property of the Port Authority being hereinafter collectively referred to as the "premises".

SECTION 2. *Term*

The term of the letting under this Agreement shall commence on June 1, 1957 and shall, unless sooner terminated, or unless extended, expire on May 31, 1962.

SECTION 3. *Rights of User by the Lessee*

The Lessee shall use the premises for the following purposes only and for no other purpose whatsoever: for an office in connection with the sale by the Lessee of in-bond wines and liquors.

SECTION 4. *Rental*

(a) The Lessee agrees to pay to the Port Authority a basic rental for the premises at the rate of Three Thousand Nine Hundred Dollars and No Cents ($3,900.00) per annum.

[fol. 261] (b) The Lessee agrees to pay to the Port Authority the percentage rental, if any, stated in Item 1 of Exhibit B, attached hereto and made a part hereof.

(c) The time for making payments of rental and the method of computation and abatement thereof are set forth in Item 1 of Exhibit B.

SECTION 5. *Obligations in Connection with Any Percentage Rental*

If any rental hereunder is measured by a percentage of the Lessee's gross receipts, the Lessee shall:

(a) Take all reasonable measures in every proper manner to maintain, develop and increase the business conducted by it hereunder;

(b) Not divert or cause or allow to be diverted any business from the Terminal;

(c) Maintain in accordance with accepted accounting practice during the letting and for one year thereafter and for such further period until the Lessee shall receive written permission from the Port Authority to do otherwise, records and books of account recording all transactions at, through or in anywise connected with the Terminal, which records and books of account shall be kept at all times within the Port of New York District and permit, in ordinary business hours during such time, the examination and audit by the officers, employees and representatives of the Port Authority of such records and books of account and also any records and books of account of any company which is owned or controlled by the Lessee, if said company performs services, similar to those performed hereunder by the Lessee, anywhere in the Port of New York District;

(d) Permit in ordinary business hours the inspection by the officers, employees and representatives of the Port Authority of any equipment used by the Lessee, including but not limited to cash registers and recording tapes;

(e) Furnish on or before the twentieth day of each month following the commencement date of the letting a sworn statement of gross receipts arising out of the operations of the Lessee hereunder for the preceding month;

(f) Install and use such cash registers, sales slips, invoicing machines and any other equipment or devices for recording orders taken or services rendered as may be appropriate to the Lessee's business and necessary or desirable to keep accurate records of gross receipts.

SECTION 6. *Governmental Requirements*

(a) The Lessee shall procure from all governmental authorities having jurisdiction over the operations of the Lessee at the premises all licences, certificates, permits or other authorization which may be necessary for the conduct of its operations.

(b) The Lessee shall pay all taxes, license, certification, permit and examination fees and excises which may be assessed, levied, exacted or imposed on its property or operation hereunder or on the gross receipts or income therefrom, and shall make all applications, reports and returns required in connection therewith.

(c) The Lessee shall promptly observe, comply with and execute the provisions of any and all present and future governmental laws, rules, regulations, requirements, orders and directions which may pertain or apply to the operations of the Lessee on the premises or its occupancy thereof, and the Lessee shall, in accordance with and subject to the provisions of Section 15 hereof, make any and all structural and nonstructural improvements, alterations or repairs of the premises that may be required at any time hereafter by any such present or future law, rule, regulation, requirement, order or direction.

(d) The obligation of the Lessee to comply with governmental requirements is provided herein for the purpose of assuring proper safeguards for the protection of persons and property on the premises and a proper operation by the Lessee. Such provision is not to be construed as a submission by the Port Authority to the application to itself of such requirements or any of them.

* * * * * * *

[fol. 262] SECTION 21. *Termination*

(a) If any one or more of the following events shall occur, that is to say:

(1) The Lessee shall become insolvent, or shall take the benefit of any present or future insolvency statute, or shall make a general assignment for the benefit of

creditors, or file a voluntary petition in bankruptcy or a petition or answer seeking an arrangement or its reorganization or the readjustment of its indebtedness under the federal bankruptcy laws or under any other law or statute of the United States or of any State thereof, or consent to the appointment of a receiver, trustee, or liquidator of all or substantially all its property; or

(2) By order or decree of a court the Lessee shall be adjudged bankrupt or an order shall be made approving a petition filed by any of the creditors or, if the Lessee is a corporation, by any of the stockholders of the Lessee, seeking its reorganization or the readjustment of its indebtedness under the federal bankruptcy laws or under any law or statute of the United States or of any State thereof; or

(3) A petition under any part of the federal bankruptcy laws or an action under any present or future insolvency law or statute shall be filed against the Lessee and shall not be dismisesd within thirty (30) days after the filing thereof; or

(4) The letting hereunder or the interest or estate of the Lessee under this Agreement shall be transferred to, pass to or devolve upon, by operation of law or otherwise, any other person, firm or corporation; or

(5) The Lessee, if a corporation, shall, without the prior written approval of the Port Authority, become a possessor or merged corporation in a merger, a constituent corporation in a consolidation, or a corporation in dissolution; or

(6) The Lessee is, or the Lessees collectively are doing business as, or constitute a copartnership, and the said copartnership shall be dissolved as the result of any act or omission of its copartners or any of them, or by operation of law or the order or decree of any court having jurisdiction, or for any other reason whatsoever; or

(7) By or pursuant to, or under authority of any legislative act, resolution or rule, or any order or decree of any court or governmental board, agency or officer having jurisdiction, a receiver, trustee, or liquidator shall take possession or control of all or substantially all of the property of the Lessee, and such possession or control shall continue in effect for a period of fifteen (15) days; or

(8) Any type of strike or other labor activity is directed against the Lessee at the Terminal resulting in picketing or boycott for a period of at least forty-eight (48) hours which, in the opinion of the Port Authority, adversely affects or is likely adversely to affect the operation of the Terminal or the operations of other lessees or licensees thereat, whether or not the same is due to the fault of the Lessee, and whether caused by the employees of the Lessee or by others; or

[fol. 263] (9) Any lien is filed against the premises because of any act or omission of the Lessee and is not removed within ten (10) days; or

(10) The Lessee shall voluntarily abandon, desert, vacate or discontinue its operations in the premises; or

(11) The Lessee shall fail duly and punctually to pay the rentals or to make any other payment required hereunder when due to the Port Authority; or

(12) The Lessee shall fail to keep, perform and observe each and every other promise, covenant and agreement set forth in this Agreement on its part to be kept, performed or observed, within ten (10) days after receipt of notice of default thereunder from the Port Authority (except where fulfillment of its obligation requires activity over a period of time, and the Lessee shall have commenced to perform whatever may be required for fulfillment within ten (10) days after receipt of notice and continues such performance without interruption except for causes beyond its control);

then upon the occurrence of any such event or at any time thereafter during the continuance thereof, the Port Authority may by five (5) days' notice terminate the letting and the rights of the Lessee hereunder, such termination to be effective upon the date specified in such notice. Such right of termination and the exercise thereof shall be and operate as a conditional limitation.

(b) If any of the events enumerated in subdivision (a) of this Section shall occur prior to the letting, the Lessee shall not be entitled to enter into possession of the premises and the Port Authority upon the occurrence of any such event or at any time thereafter during the continuance thereof by twenty-four hours' notice may cancel the interest of the Lessee under this Agreement, such cancellation to be effective upon the date specified in such notice.

(c) No acceptance by the Port Authority of rentals, fees, charges or other payments in whole or in part for any period or periods after a default of any of the terms, covenants and conditions to be performed, kept or observed by the Lessee shall be deemed a waiver of any right on the part of the Port Authority to terminate the letting.

(d) No waiver by the Port Authority of any default on the part of the Lessee in performance of any of the terms, covenants or conditions hereof to be performed, kept or observed by the Lessee shall be or be construed to be a waiver by the Port Authority of any other or subsequent default in performance of any of the said terms, covenants and conditions.

• • • • • • •

[fol. 264] SECTION 41. *Basic Lease*

(a) Notwithstanding any other provision of this Agreement, this Agreement shall in any event expire with the expiration or termination of the lease of the Terminal from The City of New York to the Port Authority under the agreement of lease between the City and the Port Authority dated April 17, 1947, as the same from time to time may have been or may be supplemented or amended. Said agreement dated April 17, 1947 has been recorded in the

Office of the Register of Deeds for the City of New York, County of Queens, on May 22, 1947 in Liber 5402 of Conveyances, at page 319, et seq. No greater rights or privileges are hereby granted to the Lessee than the Port Authority has power to grant under said agreement as supplemented or amended as aforesaid.

(b) The Port Authority has agreed by a provision in its said agreement with the City covering the Terminal to conform to the enactments, ordinances, resolutions and regulations of the City and of its various departments, boards and bureaus in regard to the construction and maintenance of buildings and structures and in regard to health and fire protection to the extent that the Port Authority finds it practicable so to do. The Lessee shall, within forty-eight (48) hours after its receipt of any notice of violation, warning notice, summons or other legal process for the enforcement of any such enactment, ordinance, resolution or regulation, deliver the same to the Port Authority for examination and determination of the applicability of the said agreement of lease provision thereto. Unless otherwise directed in writing by the Port Authority, the Lessee shall conform to such enactments, ordinances, resolutions and regulations insofar as they relate to the operations of the Lessee at the Terminal. In the event of compliance with any such enactment, ordinance, resolution or regulation on the part of the Lessee, acting in good faith, commenced after such delivery to the Port Authority but prior to the receipt by the Lessee of a written direction from the Port Authority, such compliance shall not constitute a breach of this Agreement, although the Port Authority thereafter notifies the Lessee to refrain from such compliance. Nothing herein contained shall release or discharge the Lessee from compliance with any other provision hereof respecting governmental requirements.

* * * * * * *

[fol. 265]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF EXHIBIT No. 6

FORM XLD—62457

Port Authority Lease No. L-CY-17
(said Lease being dated as of October 31, 1956)
Extension No. 1
Port Authority Facility—
New York International Airport

EXTENSION OF LEASE

THIS AGREEMENT, dated as of April 2, 1962, by and between THE PORT OF NEW YORK AUTHORITY (hereinafter called "the Port Authority") and IDLEWILD BON VOYAGE LIQUOR CORPORATION (hereinafter called "the Lessee"),

WITNESSETH, That:

WHEREAS, the Port Authority and the Lessee entered into a lease identified above by Port Authority Lease Number and by date and covering premises at the above-mentioned Port Authority Facility (which lease, as the same may have been supplemented, amended and extended, is hereinafter called "the Lease"); and

WHEREAS, the Port Authority and the Lessee desire to extend the term of the letting under the Lease;

NOW, THEREFORE, in consideration of the covenants and mutual agreements herein contained, the Port Authority and the Lessee hereby agree as follows:

1. The term of the letting under the Lease is hereby extended for the period ending on the 31st day of December, 1967, unless sooner terminated, at a rental during the extension as follows: A basic rental at the annual rate of THREE THOUSAND NINE HUNDRED DOLLARS AND NO CENTS ($3,900.00) plus a percentage rental as provided in the Lease payable as provided therein.

• • • • • • •

[fol. 266] 5. As hereby amended, all of the terms, covenants, provisions, conditions and agreements of the Lease shall be and remain in full force and effect.

• • • • • • •

[fol. 267a]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF EXHIBIT No. 7

• • • • • • •

[fol. 268] Form F-Privilege, All Facilities
5-18-49

For Port Authority Use Only
P-CY-167

TWA Contract 12161-A

THE PORT OF NEW YORK AUTHORITY

111 Eighth Avenue
New York 11, N. Y.

PERMIT

The Port of New York Authority (herein called the "Port Authority") hereby grants to the Permittee hereinafter named the hereinafter described privilege at the Port Authority Facility hereinafter named, in accordance with the Terms and Conditions hereof and the endorsements annexed hereto; and the Permittee agrees to pay the fees hereinafter specified and to perform all other obligations imposed upon it in the Terms and Conditions and endorsements:

1. FACILITY: New York International Airport
2. PERMITTEE: IDLEWILD BON VOYAGE LIQUOR CORPORATION
3. PERMITTEE'S ADDRESS:
   International Arrival Building
   New York International Airport
   Jamaica 30, New York

4. PERMITTEE'S REPRESENTATIVE: A. Giliotti

5. PRIVILEGE: As set forth in Special Endorsement No. 1

6. FEES: As set forth in Special Endorsement No. 2

7. EFFECTIVE DATE: January 1, 1961

8. EXPIRATION DATE: An indefinite period unless sooner revoked or terminated in accordance with Section 1 as amended of the Terms and Conditions.

9. ENDORSEMENTS: 2.6, 3.1, 4.1, 10.1, 17.1, 18.1, 19.2, 21.1, 22 and SPECIAL

THE PORT OF NEW YORK AUTHORITY

By /s/ W. M. SCHWARZ

Deputy Director
Dept. of Real Estate

IDLEWILD BON VOYAGE LIQUOR CORPORATION
Permittee

By /s/ ARTHUR GILIOTTI

Title President

Dated: As of January 1, 1961

Agreed to this 29th day of Sept., 1961.

TRANS WORLD AIRLINES, INC.

By /s/ FRED M. BETTS

Title Vice President

[fol. 269] SPECIAL ENDORSEMENTS

1. By agreement of lease dated as of January 15, 1958 (said agreement of lease as supplemented and amended being hereinafter called "the Airline Lease") and the Port Authority leased to Trans World Airlines, Inc. (hereinafter called "the Airline") certain premises at New York International Airport for the construction of a Passenger Terminal Building (hereinafter called "Unit Terminal") to be used for the purposes set forth in Section 5 of the Airline Lease. It was contemplated under the Airline Lease that certain consumer services would be operated in space in the Unit Terminal provided by the Airline subject to certain terms and conditions as set forth in the Airline Lease. Pending completion of the Unit Terminal the Port Authority and the Airline have agreed that premises now occupied by the Airline (pursuant to Supplement No. 2 to the Airline Lease dated as of November 20, 1959) in the Temporary Terminal Building shall be deemed to be Unit Terminal premises for the purpose of said Airline Lease provisions dealing with consumer services. The Airline and the Permittee have heretofore entered into a letter agreement dated December 21, 1960 and accepted January 6, 1951 under which the Permittee agreed to operate a stand for the sale of inbond wines and liquor in the Airline premises in the Temporary Terminal Building and it was stipulated in said letter agreement that the Permittee would also enter into this Permit with the Port Authority covering such operation.

The Port Authority hereby grants to the Permittee the privilege of performing the following operations in the Temporary Terminal Building and the Permittee hereby agrees to perform the same subject to all the terms and conditions of this Permit: operation of a counter for the sale at retail of inbond wines and liquor.

The Permittee acknowledges that it has made its own arrangement with the Airline in the said letter agreement as to space and facilities in which the aforesaid operations are to be conducted and the Port Authority has made no representations or warranties as to the location, size, adequacy or suitability of said space and facilities. The Permittee's space designated under the letter agreement is

referred to as "the Space" under this Permit. The Permittee understands that the permission granted hereby and by the Airline is no indication that it will receive a similar permission in the permanent Unit Terminal Building.

/s/ Van N

For the Port Authority

Initialled:

/s/ A G

For the Permittee

• • • • • • • •

[fol. 270]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF EXHIBIT No. 8

PAWI-561

AGREEMENT

THIS AGREEMENT, made as of January 1, 1961, by and between THE PORT OF NEW YORK AUTHORITY (hereinafter called "the Port Authority"), a body corporate and politic created by Compact between the States of New York and New Jersey with the consent of the Congress of the United States of America, and having an office for the transaction of business at 111 Eighth Avenue, New York 11, New York, and PAN AMERICAN WORLD AIRWAYS, INC. (hereinafter called "the Airline"), a New York corporation, whose address is 135 East 42nd Street, New York 17, New York and whose representative is its Executive Vice President, Overseas Division and IDLEWILD BON VOYAGE LIQUOR CORPORATION (hereinafter called "the Operator"), a New York corporation whose address is 23-19 33rd Road, Astoria, New York and whose representative is Arthur Giliotti

WITNESSETH, That:

• • • • • • • •

[fol. 271] Section 1. *Letting by the Airline*

The Airline hereby sublets to the Operator and the Operator hereby hires and takes from the Airline in the Terminal at New York International Airport in the County of Queens, City and State of New York the space as shown in diagonal hatching on the sketch annexed hereto, made a part hereof and marked "Exhibit A", together with the fixtures, improvements and other property, if any, of the Airline located or to be located therein or thereon, all said space, fixtures, improvements and other property of the Airline being hereinafter collectively called "the premises".

Section 2. *Term*

The term of the subletting shall commence on January 1, 1961 and shall, unless sooner terminated or extended, expire on December 31, 1966.

Section 3. *Services by the Operator*

The Operator agrees to provide the following services at the Terminal and further agrees to use the premises solely for the purposes of providing said services and for no other purpose whatsoever: the sale at retail of in-bond liquors.

* * * * * * *

[fol. 272] Section 6. *Governmental Requirements*

(a) The Operator shall procure from all governmental authorities having jurisdiction over the operations of the Operator at the premises all licenses, certificates, permits or other authorization which may be necessary for the conduct of its operations.

(b) The Operator shall pay all taxes, license, certification, permit and examination fees and excises which may be assessed, levied, exacted or imposed on its property or operation hereunder or on the gross receipts or income therefrom, and shall make all applications, reports and returns required in connection therewith.

[fol. 273] (c) The Operator shall promptly observe, comply with and execute the provisions of any and all present and future governmental laws, rules, regulations, requirements, orders and directions which may pertain or apply to the operations of the Operator on the premises or its occupancy thereof, and the Operator shall, in accordance with and subject to the provisions of Section 15 hereof, make any and all structural and nonstructural improvements, alterations or repairs of the premises that may be required at any time hereafter by any such present or future law, rule, regulation, requirement, order or direction.

(d) The obligation of the Operator to comply with governmental requirements is provided herein for the purpose of assuring proper safeguards for the protection of persons and property on the premises and a proper operation by the Operator. Such provision is not to be construed as a submission by the Port Authority to the application to itself of such requirements or any of them.

• • • • • • •

2237

APPERSON BUSINESS FORMS, INC.
1431 EAST SIXTH STREET
LOS ANGELES 21, CALIF.
MA 9-1910

9-10 BRIDGE STREET
NEW YORK 4, N. Y.
BO 9-0077

Duty Collected on Delivery

Customs Form 3312
TREASURY DEPARTMENT
Jan. 1956

Form Approved.
Budget Bureau No. 48-R2124.

TRANSPORTATION ENTRY AND MANIFEST OF GOODS SUBJECT TO CUSTOMS INSPECTION AND PERMIT

BUREAU OF CUSTOMS

RWHSE Entry No. _____

Port Nogales, Arizona

Date _____

Entry No. _____

Class of Entry WD, EX.
(I. T.) (W.H.T.) (Ind. Et.) (T. E.) (Produce, etc.)

Dist. No. 26 Port Code No. 94 First U. S. Port or Unlading _____

Port of NOGALES, ARIZONA Date _____

Entered or imported by AMMEX Warehouse Company, Inc. to be shipped

in bond via Bonded Cartmen C.H.L. #4 (C. H. L. number) AMMEX Warehouse Company, Inc. (Vessel or carrier) (Car number and initial) consigned to (Pier or station)

Collector of customs at Nogales, Arizona Final foreign destination Mexico (For exportations only)

Consignee Individual purchaser (see Cartman's tickets) (As customs port of exit or destination)

Foreign port of lading _____ B/L No. _____ Date of sailing _____
(Above information to be furnished only when merchandise is imported by vessel)

Imported on the _____ (Name of vessel or carrier and motive power) Flag _____ on _____ (Date imported) via _____ (Last foreign port)

Exported from _____ (Country) on _____ (Date) Goods now at AMMEX Whse. Co., Inc., Nogales, Ariz. (Name of warehouse, station, pier, etc.)

Marks and Numbers of Packages	Description and Quantity of Merchandise Number and Kind of Packages (Describe fully as per shipping papers)	Gross Weight in Pounds	Value (Dollars only)	Rate	Duty
	Cs. 12-4/5 Qt. each W.G.				
Bal. Fwd.	Cs.				
This Wdl.	Cs.				
New Bal.	Cs.				

C. O. No.

CERTIFICATE OF LADING FOR TRANSPORTATION IN BOND AND/OR LADING FOR EXPORTATION FOR

I truly declare that the statements contained herein are true and correct to the best of my knowledge and belief.

AMMEX Warehouse Company, Inc.

Port of NOGALES, ARIZONA Date

Entered or imported by AMMEX Warehouse Company, Inc. to be shipped

in bond via Bonded Cartmen C.H.L. #4 AMMEX Warehouse Company, Inc. consigned to
(C. H. L. number) (Vessel or marine) (Car number and initial) (Pier or station)

Collector of customs at Nogales, Arizona Final foreign destination Mexico
(For exportations only)

Consignee Individual purchaser (see Cartman's tickets)
(At customs port of exit or destination)

Foreign port of lading B/L No. Date of sailing
(Above information to be furnished only when merchandise is imported by vessel)

Imported on the Flag on via
(Name of vessel or carrier and motive power) (Date imported) (Last foreign port)

Exported from on Goods now at AMMEX Whse. Co., Inc., Nogales, Ariz.
(Country) (Date) (Name of warehouse, station, pier, etc.)

Marks and Numbers of Packages	Description and Quantity of Merchandise Number and Kind of Packages (Describe fully as per shipping papers)	Gross Weight in Pounds	Value (Dollars only)	Rate	Duty
	Cs. 12-4/5 Qt. each W.G.				
Bal. Fwd.	Cs.				
This Wdl.	Cs.				
New Bal.	Cs.				

C. O. No.

CERTIFICATE OF LADING FOR TRANSPORTATION IN BOND AND/OR LADING FOR EXPORTATION FOR

(Port)

With the Exceptions Noted Above, the Within-Described Goods Were:

Delivered to the Carrier named above, for delivery to the Collector of Customs at destination sealed with Customs seals Nos. or the packages (were) (were not) labeled, or corded and sealed.

(Inspector or warehouse officer)

(Date)

Laden on the—

(Vessel, vehicle, or aircraft)

which cleared for—

on (Date)

as verified by export records.

(Inspector)

(Date)

I truly declare that the statements contained herein are true and correct to the best of my knowledge and belief.

Entered or withdrawn by AMMEX Warehouse Company, Inc.

To the Inspector or Warehouse Officer: The above-described goods shall be disposed of as specified herein.

For the Collector.

Received from the collector of customs of above district the merchandise described in this manifest for transportation and delivery into the custody of the customs officers at the port named above, all packages in apparent good order except as noted hereon.

AMMEX Warehouse Company, Inc.

Attorney or Agent of Carrier.

[fol. 274]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF EXHIBIT No. 9

[fols. 275-276]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF EXHIBIT No. 10

(See opposite) ☞

ORIGINAL FREIGHT BILL

PRO. DATE	SHIPPER'S NO.	PICK UP UNIT	DRIVER	CARTAGE AGENT	AMOUNT
5/23/62	6027	WASH P			

PASCAL INC
8000 V ST NE
WASH DC

COOL OF CUSTOMS
IDLEWILD BON VOYAGE LOB CORP
RM 2123 INTL ARRIVAL BLDG
NY INTL AIRPORT JAMAICA 30 NY

12 122755

C.O.D.

PRESTON
TRUCKING CO., INC.
PRESTON, MARYLAND
PHONE
ORchard 3-7151

		IN BOND	IN BOND		
30	OFC & YR OLD LAB	1900			
10	CH CARRING 6 PKS BOND LAB	300			
60	TOTAL SPEC INSTRUCTIONS	2200	258	58 96	
	PL DELIVER WEDNESDAY MAY 23RD				
	BEFORE 10:30 AM				
	IT W 00653				

DEL 5.23 BEFORE 10:30 AM

I.C.C. REGULATIONS REQUIRE THIS BILL BE PAID WITHIN 7 DAYS

PAY THIS AMOUNT IN BOND JUN 3 ABOVE DATE

DUE FROM CONSIGNEE, CARRIER

[fol. 277.]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF EXHIBIT No. 11

(See opposite) ☞

Date 11/17 Page 1 of ? pages.

(IDLEWILD) BON-VOYAGE LIQUOR CORP.

JFK INTERNATIONAL AIRPORT - JAMAICA 30, N.Y.

Bonded Liquor

KIND	BRAND	UNIT OF ISSUE	NUMBER TO BE ACCOUNTED FOR	SERIAL NO. OR U.S. NO.
Scotch	VAT 69	5	120	0000

Date of Departure	Airline	Flight No.	Passenger's Name	Invoice & Delivery Receipt		Used	Balance
	BALANCE BROUGHT FORWARD FROM PAGE						

[fol. 278]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF EXHIBIT No. 12

(See opposite) ☞

PHONE OLYMPIA 6-7780
ADS - 7888

No. 98647A

IDLEWILD BON-VOYAGE LIQUOR CORP.

TAX-FREE LIQUORS

ROOM 2123 INTERNATIONAL ARRIVALS BUILDING
NEW YORK INTERNATIONAL AIRPORT
JAMAICA 30, N. Y.

VOID

NAME

DATE	AIRLINE	FLIGHT NO.

ECY TOURIST SEAT	FIRST CLASS SEAT	TIME	☐ A.M. ☐ P.M.

NO. UNITS	DESCRIPTION	PRICE	AMOUNT
	VOID		

PLAINTIFF EXHIBIT 12
U.S. Dist. Court
S.D. of N.Y.
OCT 6 1960

SIGNED VOID

IMPORTANT

1. All liquors purchased through this store are sold "In Bond" and cannot be brought back into the United States under Passenger Allowance accorded in par. 1798 of the U. S. Tariff Act.
2. Merchandise sold is for export only and to be delivered at Foreign Port of Debarkation. Please request delivery before leaving airplane.
3. Any claim for non-delivery must be accompanied by this receipt and presented to Idlewild Bon-Voyage Liquor Corp. within 60 days of purchase. No claim will be honored if passenger changes flight without notifying this office 1 hour prior to departure of original booking.

CUSTOMER'S INVOICE

FORM IBV 1

[fol. 279]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF EXHIBIT No. 13

(See opposite) ☞

IDLEWILD BON-VOYAGE LIQUOR CORP.

TAX FREE LIQUORS

ROOM 2123, 2nd FLOOR, INTERNATIONAL ARRIVAL BLDG. 28200

N. Y. INTERNATIONAL AIRPORT • JAMAICA 30, N. Y. A. D. S. 1585

Olympic & 7[illegible]

VOID

DATE _____ AIRLINE _____ FLIGHT NO. _____

INVOICE NO. _____

RECEIVED FOR EXPORT _____ PARCELS IN GOOD ORDER FOR DELIVERY AT FOREIGN PORT OF DEBARKATION TO PASSENGERS BEFORE LEAVING AIRCRAFT

DELIVERED BY _____ PURSER _____

PLAINTIFF EXHIBIT 15-OLD

U.S. Dist. Court S.D. of N.Y. OCT 5 1962

Stipulated in S.D.N.Y. 10/1/62a

EAGLE PLACE PRINTING, EAGLE PLACE, L. I. N. Y.

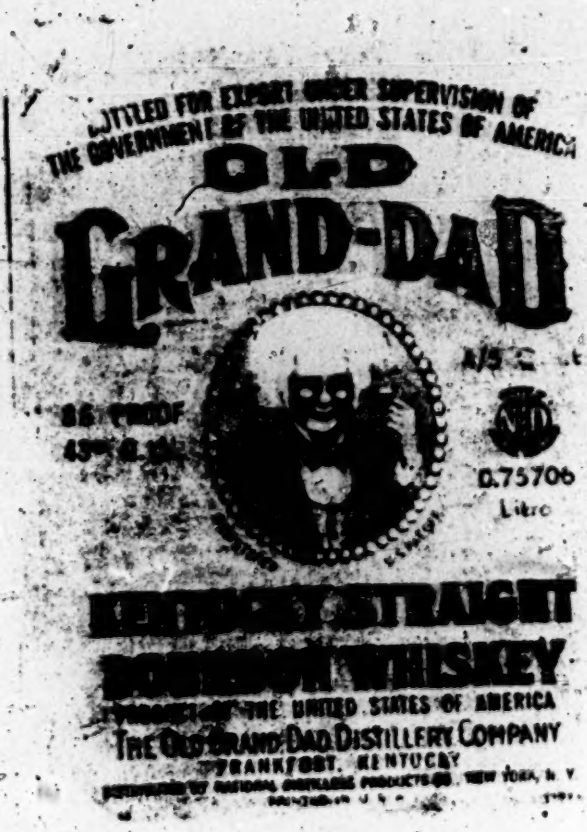
[fols. 280-281]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF EXHIBIT No. 14

(See opposite) ☞


BOTTLED FOR EXPORT UNDER SUPERVISION OF
THE GOVERNMENT OF THE UNITED STATES OF AMERICA
OLD
GRAND-DAD
0.75706
Litre
THE OLD GRAND-DAD DISTILLERY COMPANY
FRANKFORT, KENTUCKY

[fol. 282]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF EXHIBIT No. 15

January 10, 1958

Idlewild Bon-Voyage Liquor Corp.,
New York International Airport Arrival Building,
Jamaica, L.I., N.Y.

Gentlemen:

Reference is made to your recent inquiry relative to Pan American Airways acceptance of liquor shipments consigned to passengers who are to board our international flights. It is understood that the Idlewild Bon-Voyage Liquor Corporation will perform required Customs clearances with respect to having the liquor removed from your premises for delivery to this carrier's representative aboard the departing flight.

Pan American will perform the following functions in order for the Idlewild Bon Voyage Liquor Corporation to satisfy Customs that the liquor consigned to departing international passengers has been duly received on board for subsequent delivery to the passengers.

1. Thirty minutes prior to the scheduled departure of our flights, the liquor consigned to passengers reserved on the flight will be receipted for at the aircraft by the purser of the flight,

2. The liquor will then be stored aboard the aircraft for ultimate distribution to the passengers just prior to the landing of the aircraft at the first foreign country.

3. It is understood that the documents signed by the purser of the flight will be such so as to permit the Idlewild Bon Voyage Liquor Corp. to conform with Customs export requirements and that no further documentation will be required of Pan American Airways.

[fol. 283] We would be very interested in having the aforementioned procedure implemented as we believe the facility offered by the Idlewild Bon Voyage Liquor Corp. will benefit the international traveler. Further, the facility offered will enable visitors to the United States to make bargain purchases in much the way as permitted by certain European countries.

Yours very truly,

Original signed by
L. E. Burtchaell

L. E. Burtchaell
Traffic Manager

DJC:eg

[fol. 284] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
60 Civ. 2902

IDLEWILD BON-VOYAGE LIQUOR CORP., Plaintiff,

v.

MARTIN C. EPSTEIN, et al., Defendants.

(Argued October 5, 1962)

Charles H. Tuttle, of New York, N. Y.; Kelly & Schwartz, of New York, N. Y., attorneys (John F. Kelly, Esq., of counsel) for plaintiff.

Irving Galt, Assistant Solicitor General of the State of New York (Louis J. Lefkowitz, Attorney General of the State of New York, George D. Zuckerman, Deputy Assistant Attorney General of the State of New York on the brief) for defendants.

Before Hays, Circuit Judge, Dawson and Bonsal, District Judges.

Action under the Commerce, Export-Import and Supremacy clause of the Constitution of the United States and Section 311 of the Tariff Act of 1930, 19 U.S.C. §1311, to enjoin the New York State Liquor Authority from enforcing the New York Alcoholic Beverage Control Law §§3 (28), 62 and 100 with respect to plaintiff.

Judgment for plaintiff.

OPINION—December 27, 1962

Hays, Circuit Judge.

Plaintiff is a New York corporation engaged in the business of selling tax-free bottled wines and liquors for export [fol. 285] to departing passengers at New York International Airport. Upon advice of the Attorney General of the State of New York, the New York State Liquor Authority, the members of which are defendants herein, informed plaintiff that its business was illegal as unlicensed and unlicensable under the provisions of the New York Alcoholic Beverage Control Law. Thereupon plaintiff instituted this action to enjoin the Liquor Authority from interfering with its business. The complaint seeks a judgment declaring the state statute, as applied, repugnant to the Commerce, Export-Import, and Supremacy clauses of the United States Constitution, and Section 311 of the Tariff Act of 1930, 19 U.S.C. §1311.

Plaintiff's original motion for the impanelling of a three judge court to consider these claims was denied. The judge to whom the application was made ruled that the case was a proper one for application of the doctrine of "equitable abstention", see *Harrison* v. *NAACP*, 360 U.S. 167 (1959), and retained jurisdiction while referring the cause to the state courts for determination of the issues presented. 188 F. Supp. 434. An appeal to the Court of Appeals for the Second Circuit was dismissed on jurisdictional grounds, one judge dissenting. 289 F. 2d 426. While unambiguously stating the view of all the judges on the panel that the district court had acted erroneously, and that a "three judge district court should have been convened" to pass

upon, *inter alia*, the abstention issue, *id.* at 430, the ma-
[fol. 286] jority felt constrained to dismiss the appeal under the rule of *Stratton* v. *St. Louis, S.W. Ry.*, 282 U.S. 10 (1930). The Supreme Court granted certiorari[1] and remanded the cause. Agreeing with the Court of Appeals that a three judge court should have been convened[2] the Court ruled that the Court of Appeals was not without power to correct a single judge who erroneously invaded the province of a three judge court, and remanded the cause to the district court for the convening of a three judge court "to consider this litigation." 370 U.S. 713 (1962). This court was convened pursuant to that order.

Plaintiff's place of business is located on the second floor of the Arrivals Building[3] at Idlewild Airport[4] in space rented from the Port of New York Authority under a lease by the terms of which the demised premises may be used only as "an office in connection with the sale . . . of in-bond wines and liquors". The building plans for these premises

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[1] 368 U.S. 812. The Court also granted a motion for leave to file a petition for a writ of mandamus to the district court. Formal action on the petition was deemed unnecessary. 370 U.S. 713, 716.

[2] "We agree with the Court of Appeals that a three-judge court should have been convened in this case. When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute. Those criteria were assuredly met here, and the applicable jurisdictional statute therefore made it impermissible for a single judge to decide the merits of the case, either by granting or by withholding relief." 370 U.S. at 715.

[3] Orders are also taken at two small areas in other buildings at the airport and phoned to the main office in the arrivals building.

[4] The Port of New York Authority leases the land on which Idlewild Airport was built from the City of New York. Unlike the situation arising when land is ceded by a state to the federal government for military or other purposes, the compact between New York and New Jersey creating the Port Authority did not alter the territorial boundaries nor substantially affect the jurisdiction of either state. See N.Y. Unconsol. Laws §§6421, 6836 (McKinney 1961).

and the premises themselves were inspected and approved by United States Customs Officials at Idlewild.

Operating from these premises, plaintiff receives orders and payment from passengers departing by plant for foreign countries. Sales are made only to passengers who present tickets and boarding cards indicating their imminent departure. While payment is made at the time of sale, the passenger is given only a receipt. The merchandise is delivered aboard the departing aircraft on documents approved by United States Customs, with instruc- [fol. 287] tions to the air line to deliver to the passenger purchaser only upon arrival at the foreign destination. This procedure was approved in 1958 by the Bureau of Customs of the United States Treasury Department, by letter of the Acting Commissioner of Customs to the New York Collector of Customs.

Plaintiff purchases the beverages it sells from several bonded wholesalers located outside the State of New York, who deal in tax free liquors for export. Upon receipt of an order from plaintiff, the merchandise is withdrawn from a bonded warehouse on Customs Form 7512, and shipped via bonded trucker to plaintiff's premises at Idlewild. One copy of the form is mailed by the wholesaler to the United States Customs Office at Idlewild, a second copy is mailed to plaintiff, a third sealed copy accompanies the shipment, and is delivered to Customs upon arrival at Idlewild. The contents of the order are received and counted by plaintiff, and entered in its records. The liquor is then stored at plaintiff's premises until resold to foreign-bound passengers, at which time a withdrawal from inventory is noted in the records. When the entire order has been resold, the records are submitted to the customs inspector at Idlewild.

Plaintiff's books, records and inventory are open to inspection by customs officials at any time, and such inspections do in fact take place. The Bureau of Customs is free to supervise the unloading of the merchandise from the bonded trucks and its transportation to plaintiff's premises [fol. 288] as well as its delivery by plaintiff to departing aircraft, and has in fact done so "numerous times".

The plaintiff's sales amount to several hundred bottles a day, the largest sales for a single day being 735.

Upon advice of the Attorney General of the State of New York, the Liquor Authority informed plaintiff, in July 1960, that its operation was illegal under the provisions of the New York Alcoholic Beverage Control Law. The Attorney General was of the opinion that plaintiff was engaged in "selling" alcoholic beverages within the meaning of §3 [28] of that Act,[5] that a license was therefore required under §100 [1],[6] but that plaintiff was not licensable, citing Rule 17 of the Rules of the State Liquor Authority, limiting the number of licenses issued in each county, and §105 (2) of the Act.[7] In response to this opinion, the New York Importers and Distillers Association circularized its members advising them that under §62 of the Alcoholic Beverage Control Law, they could not legally fill plaintiff's orders. The Liquor Authority notified at least one of the truckers delivering merchandise to plaintiff that the trucker was assisting in violations of the law. The trucker thereafter refused to make deliveries. Thus plaintiff is clearly threatened with irreparable injury, since it will be put out of business by the Liquor Authority unless it is successful in this action.

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[5] "'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state." N.Y. Alcoholic Beverage Control Law §3 [28].

[6] "No person shall . . . sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter." Section 100 [1] of the N.Y. Alcoholic Beverage Control Law.

[7] "No premises shall be licensed to sell liquors and/or wines at retail for off premises consumption, unless said premises shall be located in a store, the entrance to which shall be from the street level and located on a public thoroughfare in premises which may be occupied, operated or conducted for business, trade or industry or on an arcade or sub-surface thoroughfare leading to a railroad terminal." Alcoholic Beverage Control Law §105 [2].

An examination of the New York Alcoholic Beverage [fol. 289] Control Law as a whole suggests a considerable doubt as to its applicability to plaintiff's operations. The definition of sale in Section 3, (28) provides that "To sell . . . shall include the delivery of any alcoholic beverage in the state." This, of course, is inapplicable to plaintiff's sales. Whatever may be the purpose of Section 105 (2) in requiring that a retail liquor store have an entrance from the street level and be located on a public thoroughfare, the requirements, which may be appropriate where liquor purchases are delivered directly to the customer, seem quite irrelevant to a concern which sells liquor exclusively for delivery in a foreign country.

It is entirely probable that the legislature in adopting a statute governing the sale of liquor in New York State did not have within its contemplation the establishment of such a business as plaintiff conducts. The declaration of policy contained in Section 2 of the Alcoholic Beverage Control Law refers to sale and distribution "within the state" and states that: "The restrictions, regulations and provisions contained in this chapter are enacted by the legislature for the protection, health, welfare and safety of the people of the state." The declared "purpose of fostering and promoting temperance" would appear to be appropriate to the consumption of liquor in New York rather than in various foreign countries.

It also seems to us to be reasonably certain that the [fol. 290] courts of the State of New York would reject as unlawful the attempt of the State Liquor Authority to terminate plaintiff's business. In *During* v. *Valente*, 267 App. Div. 383, 46 N.Y.S. 2d 385 (1944), the court held that the provisions of the Alcoholic Beverage Control Law were inapplicable to the sale of liquor located in the Free Trade Zone of the Port of New York. The court said at 46 N.Y.S. 2d 387:

> "Counsel for New York State Liquor Authority argues that the provisions of the Alcoholic Beverage Control Law apply to goods within the trade zone because by the creation of the trade zone no cession of any territory was made to the Federal Government.

It is asserted that in the absence of any cession the land is a part of the State of New York and subject to its laws.

The fact that this trade zone is within the geographical limits of the State of New York is not controlling. This Court had occasion to consider the status of goods under control of the Federal Government for the purpose of re-export in Gulf Oil Corp. v. McGoldrick, 256 App. Div. 207, 9 N.Y.S. 2d 544, affirmed 281 N.Y. 647, 22 N.E. 2d 480, affirmed with opinion 309 U.S. 414, 60 S. Ct. 664, 84 L.Ed. 840. It was there held that the mere geographical location of the goods within the state of New York did not constitute an import into the state and that the sale of such goods was not subject to local regulation or tax. This decision seems conclusive of this case.

It is urged, however, that the Twenty-first Amendment to the Federal Constitution puts Portuguese Brandy on a status different from that of crude oil. The amendment in so far as relevant provides that:

'The transportation or importation into any State, Territory, or possession of the United States *for delivery or use therein* of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' (Italics our own.)

[fol. 291] By its terms the Amendment grants power to a state to regulate traffic in liquor only to the extent that such liquor is transported or imported for delivery or use within such state. The complaint contains no allegation from which it could be inferred that the sale involved the importation of the liquor into the State of New York within the meaning of the amendment."

See also *Gulf Oil Corp.* v. *McGoldrick*, 256 App. Div. 207, 9 N.Y.S. 2d 544, affirmed, 281 N.Y. 647, 22 N.E. 2d 480, (1939), affirmed 309 U.S. 414 (1940); *Rosenblum* v. *Frankel*, 279 App. Div. 66, 108 N.Y.S. 2d 6 (1951), where the court cited *During* v. *Valente* for the statement that:

"the regulatory powers of the State Liquor Authority [do not] extend to international transactions, even in

alcoholic beverages, except sales for domestic consumption in New York," 108 N.Y.S. 2d at 9.

The probability that the New York courts would decide either that the Alcoholic Beverage Control Law was inapplicable to plaintiff's business, or that its application would be an unconstitutional interference with the power of Congress over foreign commerce (see cases *supra*) would lead us, under a technical application of the doctrine of abstention, to leave the determination of these issues to the state courts. Under the peculiar circumstances of the present case we think that those conclusions argue for the opposite result, and that we should decide the constitutional issue which has been presented.

We do not think that we should send this operator of a small business trudging into the New York courts to undertake, after more than two and a half years already spent [fol. 292] in litigation, many more months of court procedures, especially when it appears to us to be a foregone conclusion that, after carrying the case to the New York Court of Appeals, or, if need be, to the United States Supreme Court, he will certainly obtain the relief he now seeks. To do so would constitute a mechanical application of the doctrine of constitutional abstention in complete disregard of the reasons for the existence of that doctrine and of the equitable aspects of the instant case.

The doctrine of abstention is equitable in origin,[8] and we should balance the injustice of subjecting plaintiff to additional expense and delay against the advantages which may accrue from adherence to the traditional policy of avoiding constitutional adjudication. In doing so we should remember that the procedure of the three judge court with direct appeal to the Supreme Court, was established for the determination of these issues at least partly because of the need for speedy resolution of the controversies. In the present case the Supreme Court remanded "for expeditious action".

That expense and delay and the probability of the result should be given equitable weight is indicated by *City of*

[8] See *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496, 500-501 (1941).

Chicago v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958), where the majority of the court rejected the dissenting view which would have required application to state authorities. The Court said:

> "Remission to [the state] courts would involve sub- [fol. 293] stantial delay and expense, and the chance of a result different from that reached below, on the issue of applicability, would appear to be slight." P. 84.

See also *Allegheny County* v. *Frank Mashuda Co.*, 360 U.S. 185 (1959):

> "The undesirability of a refusal to exercise jurisdiction in the absence of exceptional circumstances which clearly justify an abstention is demonstrated by the facts of this case. Respondents have consumed considerable time and expense in pursuing their claim that their property has been unlawfully taken. To order them out of the federal court would accomplish nothing except to require still another lawsuit, with added delay and expense for all parties. This would be a particular hardship for the respondents, who, besides incurring the added expense, would also suffer a further prolonged unlawful denial of the possession of their property if ultimately they prevail against the County and its lessee. It exacts a severe penalty from citizens for their attempt to exercise rights of access to the federal courts granted them by Congress to deny them 'that promptness of decision which in all judicial actions is one of the elements of justice.' *Forsyth* v. *Hammond*, 166 U.S. 506, 513." pp. 196-97.

And see *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U.S. 456 (1943):

> "Where the disposition of a doubtful question of local law might terminate the entire controversy and thus make it unnecessary to decide *a substantial constitutional question*, considerations of equity justify a rule of abstention. But where, as here, no state court ruling on local law could settle the federal questions that necessarily remain, and where, as here, the litiga-

> tion has already been in the federal courts an inordinately long time, considerations of equity require that the litigation be brought to an end as quickly as possible." p. 463. (Emphasis supplied.)

In the present case both parties urge that we should not abstain. They seek to avoid the "substantial delay and expense" that would result from submission of the issue to the state courts.[9] Counsel for the State of New York has stipulated that:

> [fol. 294] "the state will not press its defense of equitable abstention, but in its anxiety to have the matter disposed of at the earliest possible moment, will proceed for full submission to this court.
>
> We feel that the operations of this plaintiff have gone unchecked for two and a half years, and we would like, if possible, to submit this for the earliest possible disposition of the case on the merits."

In addition to these considerations, the constitutional issue which we decide is one of extremely narrow compass. The case is quite unlike *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941) where the Court said:

> "The complaint of the Pullman porters undoubtedly tendered a substantial constitutional issue. It is more than substantial. It touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." p. 498.

Our decision will not interfere with New York's administration of its liquor control laws except in the one particular of prohibiting the continuation of this plaintiff's business. We do not even decide that New York cannot

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[9] The reference by the Supreme Court in the prior appeal in this case to the fact that the district court originally abstained "although there was no relevant litigation then pending in the state courts", 370 U.S. at 714, lends some credence to plaintiff's contention that the Court intended us to reach the merits in this determination.

regulate and supervise the operation of plaintiff's business in the interest of those considerations which are the basis of its Alcoholic Beverage Control Law.

Not only will our decision have no widespread implications for the enforcement of New York's laws with respect to sale of liquor, it will have no important repercussions in the conduct of that business generally. Plaintiff's [fol. 295] operation is a small one. We are not made aware that there is any other like it in New York or elsewhere. If others exist apparently no effort has been made to eliminate them. Moreover the very nature of the business allows for only a few such enterprises and an operation very limited in size and scope. The fact is that whether or not plaintiff is permitted to continue its business is apparently of very little moment to anyone except plaintiff itself.

Under these circumstances to abstain from deciding the issue before us would be to reduce the doctrine of abstention to the status of a meaningless formality.

We turn then to the constitutional issue involved in plaintiff's contention that the application to its business of the New York Alcoholic Beverage Control Law in the manner threatened is repugnant to the Commerce Clause of the United States Constitution. There is no doubt that the threatened application would be constitutionally invalid if the case involved legitimate articles of commerce other than alcoholic beverages.[10] The Liquor Authority contends, however, that the attempted regulation is a valid exercise of the state police power over alcoholic beverages, and as such, is not an undue burden on commerce; or alternatively, that it is valid by reason of the Twenty-first Amendment to the Constitution of the United States. We do not agree.

It has long been settled that commerce in alcoholic beverages is not beyond the scope of protection of the Commerce Clause, *Leisy* v. *Hardin*, 135 U.S. 100 (1890); *Bowman* v. *Chicago & N. Ry.*, 125 U.S. 465 (1888), and that un-

[10] See *e.g. Lemke* v. *Farmers Grain Co.*, 258 U.S. 50 (1922) (grain); *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911) (gas). Cf. *H.P. Hood & Sons* v. *Du Mond*, 336 U.S. 525 (1949) (milk).

[fol. 296] reasonable burdens on such commerce must fall unless validated by the Twenty-first Amendment. See *State Board of Equalization* v. *Youngs Market*, 299 U.S. 59, 62 (1936) (dictum). Because of the potentially injurious effects of intoxicating liquor, "the peculiar difficulties of controlling it . . . [and] its tendency to get out of legal bounds," commerce in alcoholic beverages may be subjected to more extensive local regulation than commerce in less injurious products. *Duckworth* v. *Arkansas*, 314 U.S. 390, 396 (1941). But the regulation must nevertheless be "reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the state." *Ibid.*

In the *Duckworth* case appellant, a trucker, was convicted of transporting intoxicating liquor through the state without first having obtained the required Arkansas permit. The permit was required as "a means of establishing the identity of those who are to engage in the transportation, their route and point of destination, and [to] afford . . . opportunity for local officials to take appropriate measures to insure that the liquor is transported without diversion, in conformity to the permit." *Ibid.* It was available to qualified carriers for a nominal fee. In upholding the validity of the permit requirement the Court stated:

> "Where the power to regulate commerce for local protection exists, the states may adopt effective measures to accomplish the permitted end. The Arkansas statute does not conflict with any act of Congress. It does not forbid or preclude the transportation, or interfere with the free flow of commerce among the states beyond what is reasonably necessary to protect [fol. 297] the local public interest in preventing unlawful distribution or use of liquor within the state. It does not violate the commerce clause. Cf. Ziffrin, Inc. v. Reeves, 308 U.S. 132." 314 U.S. at 396.

The action threatened against plaintiff is his elimination from the business in which he engages. It is not applied with the purpose of "preventing unlawful distribution or use of liquor within the state". It appears that regardless

of any measures taken by plaintiff to insure against diversion of its products into New York or to render its operations open to inspection or control by state officials, the required license will not be made available. New York no doubt has power to regulate plaintiff's operation for local protection. The action proposed is not directed to that end.[11]

It is argued, however, that no requirement of reasonableness is imposed under the Twenty-first Amendment. In terms, the amendment refers only to "transportation or importation *into* any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof . . ." [emphasis supplied].[12] It is well settled that the states may control importation of intoxicating liquors into their territories without regard to the Commerce Clause.[13] But we are not here concerned with shipments into New York for "delivery or use therein". While the liquor sold by plaintiff passes through New York state and payment for it is made

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[11] This also disposes of defendant's argument that the regulation is authorized by the Wilson Act, 27 U.S.C. 121, or by the Webb-Kenyon Act, 27 U.S.C. 122, which were designed to preclude further application of the "original package doctrine" to commerce in intoxicating liquors. We do not read these statutes to authorize any and all kinds of local regulation of interstate or foreign commerce in alcoholic beverages, but only such regulation as is reasonably related to the protection of valid local interests.

Even if these statutes were to be accorded a broader meaning, it must be recalled that plaintiff's operations are conducted pursuant to the tax free export program established by §311 of the Tariff Act of 1930, 19 U.S.C. 1311. While there is no reason to suppose that Congress intended to preempt any and all state regulation applicable to exports under §311, it must at least have intended to repeal *pro tanto* any existing legislation which would authorize state regulation totally nullifying the program.

[12] "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited." Constitution of the United States, Amendment XXI, §2.

[13] See *Finch & Co.* v. *McKittrick*, 305 U.S. 395 (1939); *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401 (1938); *State Board of Equalization* v. *Youngs Market*, 299 U.S. 59 (1936).

there, it is neither finally delivered nor used until the passenger purchaser arrives at his foreign destination.

In *Collins* v. *Yosemite Park*, 304 U. S. 518 (1938), the [fol. 298] park authority sued to enjoin enforcement of the California Beverage Control Law within the park, and its application to beverages sought to be shipped into the park from other states. The Court ruled that cession of the park to the federal government had completely divested California of power to regulate liquor traffic within its confines, and that the California licensing provisions were accordingly invalid as applied. Application of these provisions prior to arrival of the liquor within the confines of the park was also held invalid. In rejecting the argument that the Twenty-first Amendment authorized the regulation under attack, the Court said:

> "The lower court was of the opinion that though the Amendment may have increased 'the state's power to deal with the problem . . . , it did not increase its jurisdiction.' With this conclusion, we agree. As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment. There was no transportation into California 'for delivery or use therein'. The delivery and use is in the Park, and under a distinct sovereignty." 304 U.S. at 538 (footnotes omitted).[14]

This analysis is clearly applicable here. "Delivery or use" of the liquors sold by plaintiff is not in New York but in some foreign country, obviously beyond the reach of the laws of New York. Plaintiff's products merely pass through New York on their way to their foreign destinations. The state cannot completely halt such passage.

Defendants would have us read the *Collins* case more [fol. 299] narrowly to apply only where liquor is en route to a federal reservation. In answer suffice it to say that the Supreme Court has not done so. In *Carter* v. *Virginia*,

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[14] *Accord*, *Johnson* v. *Yellow Cab Transit Co.*, 137 F. 2d 274 (10th Cir. 1943), *affirmed*, 321 U.S. 383 (1944).

321 U.S. 131 (1944), the Court cited the *Collins* case for the proposition that "shipment through a state is not transportation or importation into the state within the meaning of the [twenty-first] Amendment" (at 137).[15]

It is argued, however, that although *final* delivery of the liquors sold by plaintiff does not take place in New York, there is nevertheless a delivery from the wholesaler to the plaintiff which renders the Twenty-first Amendment applicable and *Collins* inapplicable. But the state has no interest in the delivery as such. "Delivery" as well as "use" is subject to state regulation because of the possibility that the liquor may be diverted from its intended destination and consumed instead in the state in which it is delivered. The cases relied upon by the defendants establish no more than the power of the states through which liquor passes or in which it is delivered for redelivery elsewhere to enact legislation to guard against such diversion.

Defendants place particular reliance in *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132 (1939) in which appellant, an Indiana trucking corporation holding a certificate under the Federal Motor Carrier Act, sought to enjoin application of the Kentucky Liquor Control Law to its activities while operating as a contract carrier transporting whiskey from Kentucky directly to Illinois. The Act required carriers [fol. 300] of alcoholic beverages to hold a transport license, which license was available only to persons holding a State Common carrier's certificate. Plaintiff had been denied such a certificate. In affirming the denial of relief below, the Court used language that was extremely broad.

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[15] See also *Nippert* v. *City of Richmond*, 327 U.S. 416, 425, n. 15:

"Thus, even the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress governing interstate trade or traffic, *United States* v. *Frankfort Distilleries*, 324 U.S. 293, whether or not also in some instances in addition to complete exclusion from passing through the State, *Collins* v. *Yosemite Park Co.*, 304 U.S. 518, in the absence of such congressional action. Cf. *Carter* v. *Virginia*, 321 U.S. 131, 137; *Ziffrin* v. *Reeves*, 308 U.S. 132, 140."

Subsequent decisions have clearly retreated from the broad language in *Ziffrin* and have recognized that the result there reached could not be justified in the absence of reasonable state concern over the possibility of diversion of through liquor shipments to local users.[18] Two years after the decision in *Ziffrin*, the court in *Duckworth* v. *Arkansas, supra*, expressly refused to base its decision on the Twenty-first Amendment (although, as pointed out by Justice Jackson, concurring, 314 U.S. at 397, it could well have done so). And the decision in *Carter* v. *Virginia*, 321 U.S. 131 (1944), was rested on an even narrower ground. The state regulations there challenged required that carriers of intoxicating liquors through the state in interstate commerce (1) use the most direct route and carry a bill of lading describing the route and (2) post a $1,000 bond conditioned on lawful transportation, and that (3) the true consignee be named in the bill of lading and be one who had a legal right to receive the shipment at destination. Appellants were seeking to run liquor across Virginia into North Carolina in violation of the laws of the latter state when they were apprehended in Virginia. In upholding the convictions under the Virginia statute, the court recognized that state's valid concern with the possibility of diversion [fol. 301] to local users, but placed its decision on still narrower grounds, saying:

> "It is enough that Virginia could conclude, in the absence of contrary federal legislation, that she could not safely permit the transportation of liquor through

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[18] The thrust of the dicta in *Ziffrin* is that the Twenty-first Amendment completely removed alcoholic beverages from the scope of application of the commerce clause. This view would not only render state regulation valid but federal regulation invalid. However this extreme position has been consistently rejected. See *United States* v. *Frankfort Distilleries*, 324 U.S. 293 (1945) (Sherman Act); *Washington Brewers Institute* v. *United States*, 137 F. 2d 964 (9th Cir. 1943) (same); *Jameson & Co.* v. *Morgenthau*, 307 U.S. 171 (1939) (*Federal Alcoholic Administration Act*); *Arrow Distilleries, Inc.* v. *Alexander*, 109 F. 2d 397 (7th Cir. 1940) (same). See also *Dowling Bros. Distilling Co.* v. *United States*, 153 F. 2d 353 (6th Cir. 1946) (upholding federal price regulations under war powers); *Taub* v. *Bowles*, 149 F. 2d 817 (U.S. Emergency Ct. App. 1945) (same).

her territory by those who concededly mean to break federal laws and the laws of a neighboring state." 321 U.S. at 137-38.

The most recent Supreme Court decision on the point is *Gordon* v. *Texas*, 355 U.S. 369 (1958), in which the facts closely resembled those in *Carter*. The defendant Gordon had entered Texas from Mexico and was en route to his home in North Carolina with over two gallons of Mexican rum in his possession when the Texas authorities demanded payment of a state tax due on the rum. The tax was payable only by persons not holding a state permit to import intoxicating liquors or to transport them through the state.[17] Gordon had neither obtained nor applied for a permit,[18] and his importation of the rum into his home state of North Carolina would apparently have violated the laws of that state.[19] Defendant's conviction for possession of illicit beverages—i.e. beverages on which a tax was payable and unpaid—was affirmed by the Supreme Court in a three line per curiam decision citing the Twenty-first Amendment and *Carter* v. *Virginia*.

We read the *Gordon* decision as no more than a reaffirmance of the narrow holding in *Carter, supra*. At most, *Gordon* v. *Texas* can be read to authorize application of state licensing provisions to through traffic in alcoholic [fol. 302] beverages when there is a substantial possibility of diversion or use of the liquor within the state and the state regulation as applied serves to check such diversion or use.

It is possible that there are some types of operations in the course of dealing in liquor which would present such

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[17] See Brief for Appellee, pp. 8-11, *Gordon* v. *Texas*, 355 U.S. 369 (1958).

[18] He was therefore without standing to challenge the Texas statute on the ground that he probably could not have obtained a permit to transport liquor across the state by private automobile. See 2 Vernons Tex. Stat. arts. 666-4 (a), 666-15 (12) (1948).

[19] See N.C. Gen. Stat. §18-58 (Supp. 1961). It is not clear, however, that the Supreme Court was aware of this factor. The Texas brief did not mention it.

danger of diversion of the liquor that ordinary measures of regulation and supervision would not suffice and therefore even transportation through the state could properly be forbidden. Plaintiff's operation is certainly not such a type. From the time the liquor enters the state until its departure, it is constantly subject to supervision and control by officials of the United States Bureau of Customs. Plaintiff's records and inventory are always open to inspection by Customs officials, and such inspections have often taken place. The possibility of theft of liquor from plaintiff's premises, located as they are in the middle of the world's largest international air terminal, is minimal. In fact, the Liquor Authority has neither alleged nor proved the diversion of so much as one bottle of plaintiff's merchandise to users within the state of New York.

The case before us does not, therefore, involve reasonable measures aimed at preventing unlawful diversion or use of alcoholic beverages within New York. The Liquor Authority does not seek to use the power of New York to regulate or supervise. It seeks to terminate. This it cannot constitutionally do.

Settle order on notice.

Paul R. Hays, Archie O. Dawson, Dudley B. Bonsal.

[fol. 306] Notice of counter-proposed final judgment (omitted in printing).

[fol. 307]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civ. 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Plaintiff,

—against—

MARTIN C. EPSTEIN, WILLIAM H. MORGAN, ROBERT E. DOYLE, JOHN C. HART and BENJAMIN H. BALCOM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York, Defendants.

DEFENDANT'S COUNTER-PROPOSED FINAL JUDGMENT

This action having been brought under the Commerce, Export-Import and Supremacy Clauses of the United States Constitution and § 311 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1311, for a judgment declaring certain provisions of the New York Alcoholic Beverage Control Law unconstitutional, as applied to plaintiff's business of selling wines and liquors to airline passengers for delivery only outside of the United States, and to enjoin and prohibit their application and enforcement by the New York State Liquor Authority with respect to the conduct of such business by plaintiff; and a hearing having been held on October 5, 1962 before the Honorable Paul R. Hays, United States Circuit Judge, and Honorable Archie O. Dawson and Honorable Dudley B. Bonsal, United States District Judges, sitting as a three-judge district court; and the Court after due deliberation having rendered and filed a written decision dated December 27, 1962 granting judgment in favor of the plaintiff and against the defendants, it is

Ordered, Adjudged and Decreed that:

1. The application to plaintiff's business of § 3, subdivision 28 and § 100, subdivision 1 as presently set forth in the Alcoholic Beverage Control Law of the State of

[fol. 308] New York, is declared to be repugnant to the Commerce, Export-Import and Supremacy Clauses of the Constitution of the United States and to § 311 of the Tariff Act of 1930 as amended, so long as and provided plaintiff engages and continues to engage exclusively in the business at New York International Airport of selling tax-free wines and liquors to departing airline passengers to be delivered to them only upon arrival at their foreign destination; and provided further that all liquors so sold or held by plaintiff for sale shall have been withdrawn from United States Government bonded warehouses, shipped to plaintiff's premises by bonded truckers and received, stored, sold and released by plaintiff in full compliance with § 311 of the Tariff Act of 1930, as amended, 19 U.S.C., § 1311, all pertinent regulations adopted thereunder, and all applicable rules, regulations and orders of the United States Treasury Department.

2. The State Liquor Authority of the State of New York, its Chairman, Members, Commissioners, officers, agents, servants or employees, be and they hereby are permanently prohibited, enjoined and restrained from applying and enforcing, or attempting to apply and enforce the provisions of § 3, subdivision 28 and § 100, subdivision 1, as presently set forth in the Alcoholic Beverage Control Law of the State of New York, against the plaintiff and its operations so long as and provided plaintiff conducts and continues to conduct its business in the location and manner and under the conditions set forth above; and provided further that nothing herein shall be construed otherwise to limit the power of the State Liquor Authority of the State of New York, its Chairman, Members, Commissioners, officers, [fol. 309] agents, servants or employees, to regulate and supervise the operation of plaintiff's business under and consistent with the purposes and objects of the Alcoholic Beverage Control Law of the State of New York.

Dated: New York, New York, January , 1963.

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[fol. 310] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
60 Civ. 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Plaintiff,

—against—

MARTIN C. EPSTEIN, WILLIAM H. MORGAN, ROBERT E. DOYLE, JOHN C. HART and BENJAMIN H. BALCOM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York, Defendants.

FINAL JUDGMENT—February 5, 1963

This action under the Commerce, Export-Import and Supremacy Clauses of the United States Constitution, and Section 311 of the Tariff Act of 1930 as amended (19 U.S.C., Section 1311), and applicable provisions of the Internal Revenue Code (Title 26 U.S.C.), to enjoin the State Liquor Authority of the State of New York and its members and agents from applying and enforcing the New York Alcoholic Beverage Control Law, Section 3, subdivision 28, Section 62 and Section 100, subdivisions 1 and 2, with respect to plaintiff's business of selling wines and liquors to airline passengers for delivery only outside the United States, having duly come on for trial on October 5, 1962, before the Honorable Paul R. Hays, United States Circuit Judge, and Honorable Archie O. Dawson and Honorable Dudley B. Bonsal, United States District Judges, sitting without a jury as a three-judge district court, convened pursuant to order of this Court dated August 23, 1962; and the allega- [fol. 311] tions and proofs of the parties having been heard and considered; and the Court having rendered and filed a decision in writing, dated December 27, 1962, granting judgment in favor of the plaintiff and against the defendants, it is hereby

Ordered, Adjudged and Decreed that, as applied to the plaintiff and its said operations by the defendants, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York, the foregoing Sections of the Alcoholic Beverage Control Law of the State of New York are repugnant to the Commerce and Supremacy Clauses of the Constitution of the United States, and as so applied are unconstitutional; and it is further

Ordered, Adjudged and Decreed that the State Liquor Authority of the State of New York, its Chairman, Members and Commissioners, and each of them, their officers, agents, servants, employees and attorneys, and all persons acting under or in concert with them, be and they hereby are permanently enjoined and restrained from applying and enforcing or attempting to apply and enforce, directly or indirectly, Section 3, subdivision 28, Section 62 and Section 100, subdivisions 1 and 2 of the Alcoholic Beverage Control Law of the State of New York, against the plaintiff and its said operations.

Dated: February 5, 1963.

Paul R. Hays, U.S.C.J., Archie O. Dawson, U.S.D.J., Dudley B. Bonsal, U.S.D.J.

Judgment Entered February 5, 1963.

James E. Valeche, Clerk.

[fol. 312] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
60 Civ. 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Plaintiff,

—against—

MARTIN C. EPSTEIN, WILLIAM H. MORGAN, ROBERT E. DOYLE, JOHN C. HART and BENJAMIN H. BALCOM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York, Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed March 13, 1963

I. Notice is hereby given that Donald S. Hostetter, being the successor in interest to Martin C. Epstein, as Chairman of the State Liquor Authority of the State of New York, and William H. Morgan, Robert E. Doyle, John C. Hart and Benjamin H. Balcom, being the Members and Commissioners of the State Liquor Authority of the State of New York, the defendants in this action, hereby appeal to the Supreme Court of the United States from the final judgment, entered in this action on February 5, 1963, declaring that the application to plaintiff of the New York State Alcoholic Beverage Control Law § 3, subd. 28, § 62 and § 100 subds. 1 and 2 is repugnant to the Commerce and Supremacy Clauses of the Constitution of the United States, and permanently enjoining the defendants from applying and enforcing the foregoing sections against the plaintiff and its operations.

This appeal is taken pursuant to 28 U.S.C. § 1253.

[fol. 313] II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Complaint and exhibits attached thereto.

2. Defendants' motion to dismiss complaint, filed July 26, 1960.

3. Opinion, dated November 4, 1960, by Hon. Alexander Bicks, denying motion to impanel three-judge Court.

4. Opinion, dated December 28, 1960, by Hon. Edward J. Dimock.

5. Order of Hon. Edward J. Dimock, dated January 4, 1961.

6. Restraining Order by Hon. John M. Cashin dated April 25, 1961.

7. Opinion, dated May 3, 1961, by Hon. John M. Cashin.

8. Opinion by Supreme Court of the United States, filed June 27, 1962.

9. Order of the Supreme Court of the United States reversing judgment and remanding to district court, filed July 23, 1962.

10. Answer of defendants, filed August 10, 1962.

11. Order convening three-judge Court, filed August 28, 1962.

12. Stenographer's Minutes of hearing before three-judge District Court, October 5, 1962.

13. Opinion of the three-judge Court, dated December 27, 1962.

[fol. 314] 14. Defendants' counter-proposed judgment, dated January 23, 1963.

15. Final judgment of three-judge District Court, dated February 5, 1963.

III. The following question is presented by this appeal:

Whether the application to plaintiff, a New York corporation engaged in the purchase and importation of intoxicating liquors from out-of-State wholesalers for resale to departing airline passengers at its private premises in the State of New York, of § 3, subd. 28, § 62 and § 100, subds.

1 and 2 of the New York State Alcoholic Beverage Control Law—which require an appropriate state license to sell alcoholic beverages at wholesale or retail and forbid the sale or delivery of alcoholic beverages for the purpose of resale to anyone not duly licensed—violates § 311 of the Tariff Act of 1930 as amended (19 U.S.C. § 1311), and the Commerce and Supremacy Clause of the Constitution of the United States.

Dated: New York, New York, March 11, 1963.

Yours, etc.

Louis J. Lefkowitz, Attorney General of the State of New York, Attorney for Defendants, Office & P. O. Address, 80 Centre Street, New York 13, N. Y., Tel. No. CO 7-9800.

[fol. 315] Proof of Service (omitted in printing).

[fol. 316] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 317]

SUPREME COURT OF THE UNITED STATES

No. 116—October Term, 1963

DONALD S. HOSTETTER, et al., etc., Appellants,

vs.

IDLEWILD BON VOYAGE LIQUOR CORPORATION.

ORDER NOTING PROBABLE JURISDICTION—October 14, 1963

Appeal from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

Mr. Justice Brennan took no part in the consideration or decision of this case.